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,	§	
	§	
BVGCD	§	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TO THE HONORABLE UNITED STATES DISTRICT COURT:

Pursuant to FED. R. CIV. P. 56, Plaintiff Fazzino Investments, LP ("Plaintiff") respectfully files this Motion for Summary Judgment on its Fifth Amendment taking claim.

INTRODUCTION

This case is a takings case against a governmental agency to uphold constitutional principles and protect Plaintiff's *groundwater property rights.* Plaintiff seeks injunctive and declaratory relief. *See, e.g.*, Complaint (Dkt. No. 1), ¶¶ 2; 39-50; 53; 54. This case is not about the extent to which individual properties are being drained. That's a distraction created by BVGCD. Nor does this case seek monetary damages or compensation for drainage.

This is a straightforward case. There is but one issue: whether the Brazos Valley Groundwater Conservation District ("BVGCD" or the "District") may apply two sets of Rules governing the production of groundwater from aquifers in the District when doing so denies landowners an opportunity to produce their fair share of groundwater and violates their constitutionally protected groundwater property rights. BVGCD's 2023 groundwater production Rules changes impose radically different production limits on adjacent landowners drawing from the same aquifer based solely on the dates on which their groundwater production permits were issued. The result of BVGCD's two-tiered groundwater production regulatory system is that District landowners are deprived of the undisputed *right* to produce their fair share of the groundwater beneath their land and the undisputed *right* to protect their land from being drained.

BVGCD's disparate treatment of groundwater rights owners comes down to a single date on the calendar: owners with groundwater production permits issued before September 14, 2023 are subject to production limits governed by one version of the District's Rules (the "Old Rules") while owners applying for permits after that date are subject to radically different—and

substantially lower—production allocations under the "New Rules." The New Rules require a groundwater rights owner to have four (4) times the acreage to produce the same amount of water as groundwater rights owners permitted under the Old Rules. Stated another way, the New Rules reduce a groundwater rights owner's production allocation to 25% of what was allowed under the Old Rules.

Even BVGCD admits that its Rules changes cut a groundwater rights owner's actual annual production limit by 50% compared to its neighbors. This disparity in production limits is not based on hydrogeology or any other science as required by TEX. WATER CODE §36.116(e)(1). Rather, the Rules changes are based on BVGCD's desire to strictly curtail water production in the District. But the burden of its heightened conservation falls on a few, but not all, landowners.

This disparate treatment of landowners in the same aquifer has been condemned in Texas since 1944. Nothing in the intervening eight decades has changed that makes this action acceptable. BVGCD has unconstitutionally infringed on, and taken, Plaintiff's and other District landowners' groundwater property rights without compensation in violation of 42 U.S.C. § 1983 and the United States and Texas Constitutions (and continues to do so).

GROUNDS FOR SUMMARY JUDGMENT

The summary judgment evidence conclusively establishes that BVGCD has (and continues to) prohibitively take Plaintiff's groundwater property rights by:

1. Taking its right to a fair opportunity to produce its fair share of the groundwater.
2. Taking its right to prevent third parties from draining its property.

SUMMARY JUDGMENT EVIDENCE

1. Excerpt from BVGCD's New Rules: Rule 6.1 (Exhibit A).

2. Excerpt from BVGCD's Old Rules: Rule 6.1 (Exhibit B).

3. Excerpts from the July 16, 2025 Rule 30(b)(6) Deposition of Alan Day, BVGCD's General Manager ("Day Depo.") (Exhibit C).

4. Declaration of Michael R. Thornhill ("Thornhill Decl.") (Exhibit D).

5. Declaration of Charles Fazzino ("Fazzino Decl.") (Exhibit E).

6. Declaration of Marvin W. Jones ("Jones Decl.") (Exhibit F).

UNDISPUTED FACTS[1]

1. Plaintiff is a Texas limited partnership that owns a 69-acre tract of land in Robertson County, Texas, over the Simsboro Aquifer that does not have a pre-September 14, 2023 groundwater well permitted or drilled on the acreage. Day Depo.(Exhibit C) at 149:9-18.

2. Plaintiff desires to sell its groundwater production rights to a commercial groundwater production company. But because of the September 14, 2023 BVGCD Rules changes, drilling a commercial water well on Plaintiff's property is not economically feasible. Thornhill Decl. (Exhibit D), ¶ 10.

3. Defendant BVGCD is a groundwater conservation district created pursuant to Chapter 36 of the Texas Water Code.

4. BVGCD's Rules govern, among other things, the production of groundwater within its jurisdiction (Brazos and Robertson Counties, Texas). The Rules create a correlative rights system, *i.e.*, the amount an owner may produce is tied directly to the amount of acreage owned or controlled. *See Stratta v. Roe,* 961 F.3d 340, 360 (5th Cir. 2020).

[1] Unless otherwise noted, the Undisputed Facts in this section of the motion are taken from the Declaration of Charles Fazzino (Exhibit E). Mr. Fazzino's Declaration was originally submitted in support of Plaintiff's Motion for Class Certification (ECF No. 31). The facts to which his Declaration attests are equally viable here. As such, Plaintiff submits it in support of this Motion for Summary Judgment.

5. The production of groundwater in the District is specifically governed by well spacing requirements (Rule 6.1) and production limits (Rule 7.1).

6. The District enforces well spacing requirements under current New Rule 6.1 (Exhibit A) on all new groundwater wells for which the registration or permit was approved after September 14, 2023. Wells permitted or registered on or before September 14, 2023, are regulated by the spacing requirements of Old Rule 6.1 (Exhibit B).

7. Under Old Rule 6.1(b)(2), all groundwater wells drilled in the Simsboro Aquifer in the District were required to be surrounded by only one (1) foot of land per one gallon per minute ("GPM") of average annual production rate or capacity. Exhibit B. Under New Rule 6.1(b)(2), all new groundwater wells drilled in the Simsboro Aquifer must be surrounded by two (2) feet of land per one GPM of average annual production rate or capacity. Exhibit A.

8. BVGCD Old and New Rule 7.1 institutes groundwater well production limits:

> [I]s limited by the number of contiguous acres that are legally assigned to the well site. The contiguous acreage assigned to the well bears a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science and the required production based acreage. The assigned contiguous acreage will be a circle based on the amount of groundwater production determined by the following formula:

$$\frac{\left(\text{Average Annual Production Rate in Gallons/Minute} \times \text{District Spacing Requirement Between Wells}\right)^2 \times \pi}{43{,}560} = \text{Total number of contiguous acres required to be assigned to the well site}$$

Rule 7.1(c). The "District Spacing Requirement Between Wells" variable in the above formula is the plug-in number from Rule 6.1(b)(2): one (1) foot of radius under Old Rule 6.1(b) and two (2) feet of radius under New Rule 6.1(b)(2).

9. Under the Old Rules, drilling a 3,000 GPM well, for example, required one (1) foot of spacing. The Old Rules further required a circle of land with a radius of 3,000 feet around the wellbore totaling 649 acres. Thornhill Decl. (Exhibit D), ¶ 8; Day Depo. at 249:4-25.

10. Under New Rule 6.1(b), a new 3,000 GPM well requires two feet of spacing, which, per the above formula, requires a landowner to own or control 2,596 acres around the wellbore. That's four times as much land necessary to produce the same amount of water. Day Depo. (Exhibit C) at 89:11-90:2; 215:2-6. As a small landowner example, under Old Rule 6.1(b), a 700 GPM well required only 35 acres surrounding the wellbore. Under new Rule 6.1(b), 141 acres surrounding the wellbore are required to drill the well. Thornhill Decl., ¶ 9.

11. Under the Old Rules Plaintiff could have been permitted for an average annual production rate of 1,170-acre feet based on the size of circle that could fit entirely within its property. Day Depo. (Exhibit C) at 152:24-153:10. But under the New Rules, Plaintiff must have four (4) times as much property to produce the same amount of groundwater. BVGCD admits that even under its construction of the New Rules, Plaintiff may only produce 585 acre-feet per year from its property (a 50% decrease). Day Depo. (Exhibit C) at 150:16-22.

12. Even though a 50% reduction is substantial, Mr. Day's math is wrong. It's worse than that. New Rule 6.1(b), in fact, reduces the amount of groundwater Plaintiff may produce after September 14, 2023 by 75%. Thornhill Decl. (Exhibit D), ¶ 8. Stated another way, BVGCD devalued Plaintiff's groundwater rights to 25% of what they were before the District changed Rule 6.1(b). Because commercially viable water wells in the Simsboro Aquifer cost in excess of $1 million to drill, and because the economic minimum production for municipal or industrial purposes requires approximately 700 GPM (1,100 acre-feet/year) (*id.*, ¶ 9), BVGCD's Rules changes render economically feasible wells impossible on properties like Plaintiff's. Thus, New

Rule 6.1 change strips Plaintiff of its fair opportunity to produce its fair share of its property rights—which constitutes an unconstitutional taking without compensation.

13. Adding insult to injury, pre-September 14, 2023 groundwater wells are not subject to the spacing or acreage requirements of New Rules 6.1 and 7.1. Because of the fugacious nature of groundwater, Plaintiff's right to offset drainage and prevent confiscation of water by its neighbors has been reduced or eliminated altogether, resulting in a further *per se* taking of Plaintiff's groundwater property rights. Thornhill Decl. (Exhibit D), ¶¶ 12-14.

14. Plaintiff has suffered (and continues to suffer) a 75% decrease in the value of its water rights while its neighbors with wells drilled under the Old Rules have suffered no diminution in value. This is a particularly stark impact given that water rights in the Simsboro Aquifer under Plaintiff's land, for example, are currently sought after by companies seeking to supply water to municipalities and industries located in other parts of Texas where water is significantly scarcer. As a practical matter, these companies can no longer lease groundwater rights or outright purchase property with groundwater rights from willing landowners, including Plaintiff, that do not own the required acreage to support the well capacities required to drill economically feasible groundwater wells. Thornhill Decl. (Exhibit D), ¶ 10.

LEGAL STANDARD

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); *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). Material facts are those that have a reasonable likelihood of affecting the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is not genuine if the trier of fact could not, after an examination

of the record, rationally find for the non-moving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT AND AUTHORITY

Per the Fifth Amendment, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. In other words, "[t]he government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021). When the government takes private property without compensating the owner, the owner may sue for rightful compensation. *Id.* To prevail, a plaintiff must demonstrate that: (i) it holds an actionable property interest, (ii) the government intentionally acted, (iii) in furtherance of a public purpose, and (iv) such action constitutes a taking. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 163–64 (1998) (citing *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972)). Plaintiff meets each of these requirements as a matter of law.

I. Plaintiff holds actionable property interests.

Plaintiff has three distinct groundwater property interests: (i) vested ownership of the groundwater beneath its land, (ii) the right to a fair opportunity to produce its fair share of the groundwater beneath its land, and (iii) the right to exclude others from appropriating the groundwater beneath its land. BVGCD's abrupt rule change violates all three interests.

A. Plaintiff has a vested ownership of the groundwater beneath its property.

In Texas, groundwater is a landowner's vested constitutionally protected private property right. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831 (Tex. 2012); *see also*, *Stratta,* 961 F.3d at 354. Even where it is inconvenient, a groundwater district may not impose regulations that work a deprivation of those constitutionally protected rights. *Day*, 369 S.W.3d at 838. Moreover, Chapter 36 of the Texas Water Code, from which BVGCD derives its authority,

expressly recognizes and adopts the common law rule vesting ownership of groundwater in landowners. *See* TEX. WATER CODE § 36.002 (stating, in pertinent part, that a landowner, including lessees and assigns, "owns the groundwater below the surface of the landowner's land as real property'' (§ 36.002(a)), and that such ownership entitles the landowner to "drill for and produce the groundwater below the surface of real property." *Id*., § 36.002(b).[2]

This concept was strongly reinforced in *Stratta*, a case in this Court also involving BVGCD, wherein the Fifth Circuit held:

> Fortunately, Texas law is not unsettled as to the landowner's basic rights. The Texas Supreme Court plainly held in *Day* that a landowner's property rights include the ownership of groundwater in place beneath his acreage, and such ownership right is subject to takings claims.

961 F.3d at 359.

Plaintiff 's vested ownership interest in its groundwater is a constitutionally protected right and an actionable property interest.

B. Plaintiff has the right to a fair opportunity to produce a fair share of the groundwater beneath its property.

As a second property interest, all groundwater rights owners are entitled to a fair opportunity to produce their fair share of the groundwater beneath their property. *Day,* 369 S.W.3d at 831; *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (Tex. 1948). As noted by the Fifth Circuit in *Stratta*: "*Day* held that one purpose of regulating groundwater is ensuring that owners in a common reservoir receive their fair share. (citation omitted). BVGCD implicitly accepted this position by setting groundwater production limits based on a spacing and production formula." *Id.,* 961 F.3d at 360.

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[2] Groundwater ownership is closely aligned with and analogized to the ownership of other fugacious underground substances, specifically oil and gas. *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016).

The Texas Supreme Court, in *Gulf Land Co. v. Atlantic Refining Co.,* 131 S.W.2d 73 (Tex. 1939), said:

> It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be "confiscation" within the meaning of Rule 37 and the Rule of May 29th.

Id. at 80. Here, "[c]onfiscation…means the denial to an owner or lessee of a fair chance to recover the oil or gas in or under his land or the equivalent in kind." *R.R. Comm'n v. DeBardeleben*, 305 S.W.2d 141, 143 (Tex. 1957).

Thereafter, the Texas Supreme Court, in *Marrs v. Railroad Commission,* 177 S.W.2d 941, 949 (Tex. 1944), said that "[t]his 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*." (emphasis added). In fact, *Marrs* nails down why BVGCD's two-tiered regulatory system is a taking:

> As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves, they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.

Id. at 948. And in *Halbouty v. Railroad Commission,* 357 S.W.2d 364 (Tex. 1962), the Texas Supreme Court further noted:

> 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.

Id. at 374. While *Gulf Land, Marrs,* and *Halbouty* pertain to oil and gas production, the Texas Supreme Court has explicitly held that oil and gas law is applicable to groundwater production because they are "not merely similar; they are drawn from each other or from the same source."

See Coyote Lake Ranch v. City of Lubbock, 498 S.W.3d 53, 64 (Tex. 2016). Thus, denying District landowners the *right* to produce their fair share of groundwater and the *right* to protect their property from drainage is a "confiscation" (taking) of their groundwater property rights.

It is the duty of a regulatory body, such as BVGCD, to protect landowners' groundwater property rights 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).

Plaintiff's right to a fair opportunity to produce a fair share of the groundwater beneath its land is a correlative right measured by the quantum of groundwater rights owned—here, by the number of acres owned or controlled. BVGCD recognizes these correlative rights in the Rules it has promulgated. *Stratta,* 961 F.3d at 360.

A 1990 Texas court of appeals case posed the question in these words: "This appeal presents the question of when the Railroad Commission may treat producers in the same reservoir differently." *Texaco Prod. Inc. v. Fortson Oil Co.,* 798 S.W.2d 622 (Tex. App.—Austin, 1990, no writ). There, the court noted:

> Correlative rights guarantee a mineral interest owner an opportunity to produce a "fair share" of the reserves underlying his land. A producer who demonstrates that reserves underlying his land are being drained, and that he does not have an opportunity to offset that drainage, establishes injury to correlative rights as a matter of law.

Id. at 624.

Plaintiff's right to a fair opportunity to produce a fair share of the groundwater beneath its land is also a constitutionally protected right and an actionable property interest.

C. Plaintiff has the right to prevent third parties from draining its property.

Plaintiff's third actionable property interest is the right to exclude others from draining its property. Regarding oil, gas, and groundwater, the right to exclude is exercised by offsetting the drainage caused by production from the common reservoir—here, the Simsboro Aquifer.

Under Texas law, a groundwater producer has no liability to his neighbor where his well produces water that migrates from the neighbor's property. *Hous. & T. C. R. Co. v. East*, 98 Tex. 146, 149 (1904). But the neighbor is not without remedy—he may drill his own well to produce water and thus prevent the migration of his water toward the other well. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) ("The rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through a reservoir."). In *Stephens County v. Mid-Kansas Oil & Gas Co*., 254 S.W. 290 (Tex. 1923), the Texas Supreme Court specifically held that "[i]f the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." *Id*. at 292.

Producing groundwater from an aquifer is accomplished in the same way oil and gas are produced—by creating an area of low pressure around the wellbore. Thornhill Decl. (Exhibit D), ¶ 12. Groundwater then moves toward the wellbore from areas where the pressure is higher. The same is true for drainage; groundwater moves from areas of high pressure to areas of low pressure (known as the "cone of depression"). *Railroad Commission v. Manziel,* 361 S.W.2d 560, 573 (Tex. 1962).

In hydrogeological terms, a producing groundwater well creates a cone of depression around the wellbore that will quickly extend beyond property boundaries so that water is drawn

to the wellbore from a neighbor's land. Thornhill Decl. (Exhibit D), ¶ 11. To protect his or her groundwater rights, the neighbor can create a competing cone of depression by drilling his or her own groundwater well, thereby excluding the intruding cone of depression. *See, e.g., Elliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1948).[3] The cones will meet somewhere between the two well bores and create a natural boundary. *Id.*, ¶ 12. But if the neighbor is subject to an artificial constraint on his ability to offset the cone of depression (*e.g.*, because of disparate groundwater production limits, such as in this case), then his or her groundwater will migrate away from their property. *Id.,* ¶ 13 As with oil and gas, the drainage becomes wrongful if one surface owner is denied the ability to offset (exclude) the drainage by extracting his or her fair share of groundwater. *Marrs*, 177 S.W.2d at 948.

The U.S. Supreme Court's opinion in *Cedar Point Nursery* makes it clear that a regulatory agency commits a taking where it attempts to "take" the right to exclude others from private property. *Id*., 594 U.S. at 149 ("The essential question is not … whether the government action at issue comes garbed as a regulation … [i]t is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."). There, the California Labor Board passed a regulation giving labor organizations a "right to take access" to an agricultural employer's property to recruit farm workers into unions. *Id*. at 143. Two employers sued, claiming that the regulation amounted to a taking of their property by appropriating without compensation an easement for union organizers to enter their property

[4] Used in this context, "curtailment" means cutting back the allowed groundwater production of all wells in an aquifer across the District regardless of when they were permitted.

The Supreme Court agreed, holding that "[t]he access regulation appropriates a right to invade the growers' property and therefore constitutes a per se physical taking. . . Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* at 149. The Court further noted:

> The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U. S. 419, 435 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Id., 594 U.S. at 149.

Moreover, "[g]iven the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement." *Id*., 594 U.S. at 150. Citing a string of prior cases involving the appropriation of easements, the Court concluded that the California regulation appropriates a right to physically invade the growers' property, to literally "take access." *Id.* at 152. If not compensated, this *per se* taking violates the Fifth and Fourteenth Amendments. *Id.*

Here, BVGCD's Rules create the functional equivalent of a permanent easement allowing neighboring wells to drain Plaintiff's groundwater without recourse. By limiting Plaintiff to 25% of the production capacity of adjacent pre-2023 permit holders, BVGCD has stripped Plaintiff of any meaningful ability to "erect an effective barrier" to invasive cones of depression. Thornhill Decl. (Exhibit D), ¶ 14. This is an appropriation of Plaintiff's right to exclude and an actionable taking under *Cedar Point*.

Plaintiff's right to exclude others from draining its property is also a constitutionally protected right and an actionable property interest.

II. BVGCD intentionally changed its Rules governing groundwater production.

BVGCD's Rules changes are intended to produce a specific result: slowing down the number of applications for groundwater permits because BVGCD is concerned about the amount groundwater production permits. The admitted purpose of the Rules changes was to reduce groundwater production in the District to avoid exceeding BVGCD's "desired future condition" (DFC). Day Depo. (Exhibit C) at 268:13-269:9.

Section 36.101(30) of the Texas Water Code defines the term "desired future condition" as "a quantitative description, adopted in accordance with Section 36.108, of the desired condition of the groundwater resources in a management area at one or more specified future times." As such, DFCs are typically expressed in terms of the way the groundwater conservation districts want their aquifers to "look" at a set time in the future. For example, a groundwater conservation district might say (as does BVGCD) that it wants the reduction of the artesian head pressure in the Simsboro Aquifer to be no more than 262 feet by 2070. Day Depo. (Exhibit C) at 112:25-113:3. A DFC is determined for each aquifer in the District and applied as an average across the District; DFCs are not applied to individual properties or wells. *Id*. at 40:19-41:1.

Nevertheless, and in part because BVGCD received "an avalanche" of applications for groundwater production permits in the early 2020s, it began looking at the impact on the DFCs of each well application submitted. *Id.* at 69:9-72:8. At a March 22, 2023 BVGCD board meeting, Mr. Day was asked to contact other Texas groundwater conservation districts to survey the methods they used to slow down the number of groundwater production permits. *Id.* at 201:24-203:23. In other words, BVGCD wanted to figure out a way "how we go about making

[the circle surrounding a wellbore] a larger area to be able to obtain a permit." *Id.* at 204:15-205:7. Mr. Day further testified that the BVGCD chose to manage the aquifers to make sure not to exceed the DFCs "and to do [its] very best not to get to a curtailment,[4] which affects everyone's property." *Id.* at 268:13-269:9.

BVGCD faced a choice: distribute the conservation burden equally across all permit holders through proportional curtailment or place the entirety of the burden on future permit applicants. It chose the latter. The decision was to shield existing permit holders while reducing new applicants' production rights by 75%. As the Supreme Court held in *Armstrong v. United States*, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

Had the District chosen proportional curtailment, it would have avoided the present situation, which was found to be unconstitutional in *Marrs*. Rather than avoiding a curtailment "affecting everyone's property," the District passed the New Rules, which resulted in a *de facto* curtailment of groundwater production for the landowners that did not yet have permits. Stated another way, BVGCD decided it could not meet its DFCs if additional groundwater production permits were issued at the production rate allowed by the Old Rules, so it intentionally placed the burden of meeting its DFC goals on landowners who did not then have a permit, violating the Fifth Amendment in the process. *See, e.g.*, *Armstrong*, 364 U.S. at 49.

III. BVGCD's Rules were changed for a public purpose.

[4] Used in this context, "curtailment" means cutting back the allowed groundwater production of all wells in an aquifer across the District regardless of when they were permitted.

As noted above, BVGCD's only motivation for changing its Rules was to curtail groundwater production to meet its aquifer DFCs. Stated differently, BVGCD was motivated to achieve water conservation, a public purpose, by curtailing groundwater production. Its mistake came when it curtailed groundwater production disparately based not on aquifer conditions, hydrogeology, or science—as required by the Texas Water Code—but rather, the date a landowner was granted a groundwater production permit.

Water conservation is a public purpose. Otherwise, curtailing groundwater production would be unconstitutional. Thus, BVGCD's actions at issue here were for a public purpose. It could have accomplished this purpose in the manner it has implemented if—but only if—it compensated Plaintiff and the other District landowners whose groundwater property rights were taken to achieve that purpose, which BVGCD did not do. Ergo, this action.

IV. BVGCD's Rules changes constitute a taking.

Because groundwater is a landowner's property, any order, regulation, or act—such as New Rules 6.1 and 7.1—that takes, harms, or destroys such landowner's groundwater property rights without compensation is prohibited by the Fifth Amendment to the U. S. Constitution (as made applicable to the states via incorporation into the Fourteenth Amendment) (*Chicago, Burlington & Quincy R.R. Co. v. City of Chicago* 166 U.S. 226 (1897)) and Article I, Section 17 of the Texas Constitution. *Marrs*, 177 S.W.2d at 949. Here, by amending Rules 6.1 and 7.1 in the above-described manner, BVGCD has taken (and continues to take) Plaintiff's groundwater property rights without compensation, in violation of the Fifth Amendment, 42 U.S.C. § 1983, and the Texas Constitution, by denying Plaintiff the undisputed *right* to produce its fair share of the groundwater beneath its land and the undisputed *right* to protect its land from being drained.

BVGCD granted numerous groundwater production permits before September 14, 2023 that allowed the holders to produce an amount of groundwater based on Old Rules 6.1 and 7.1. These pre-September 14, 2023 groundwater production permits still exist and are scattered randomly over homogeneous aquifers in the District, including the Simsboro Aquifer. Thornhill Decl. (Exhibit D), ¶ 11. It is undisputed (and indisputable) that anyone—and that means everyone—who applies for a post-September 14, 2023 groundwater production permit must have 400% more land to support the same amount of production from the same homogenous aquifer as produced under a pre-September 14, 2023 groundwater production permit. Per Mr. Day, there are no exceptions. Day Depo. (Exhibit C) at 53:7-22; 77:1-78:6; 150:3-15.

The result of these disparate sets of Rules is clear: the amount of groundwater that Farmer A can produce from his or her 100 acres after September 14, 2023 has been trimmed by 75% —every time for every permit application, no exception. *Id*. at 53:7-22; 77:1-78:6; 150:3-15. This practice falls squarely under the constitutional prohibitions in *Marrs, Day*, and *Stratta*.

In *Marrs*, the Texas Supreme Court had before the very situation now before this Court. There, certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long shown to be productive of oil. *Id*. At 943. In somewhat simplified terms, a group of mineral owners in the northern portion of the field had established early production from numerous wells, thereby establishing a "pressure sink" that would cause oil to migrate toward the area. *Id*. Owners in the southern portion of the field had developed wells at a slower pace but were able to demonstrate that substantial reserves of oil existed in their area, particularly as compared to the northern area which had been subject to greater depletion over the years. *Id*. Before the regulatory action in question, the owners in the southern area had established a line of wells between the two areas that produced at maximum

capacity and essentially established a "shield" protecting them from drainage from the northern area. *Id*. At 949. The Railroad Commission then established field rules preventing this line of "shield" wells from producing their maximum capacity. *Id*. at 946. The effect of the field rules was to permit oil from the southern area to once again migrate toward the pressure sink in the northern area. *Id*. at 945. *Marrs* was filed on the theory that production in the southern area was so restricted by the Commission's proration orders that the owners there were unable to recover their oil before it drained away to the more densely drilled northern area. *Id*. at 946.

The Texas Supreme Court's opinion in *Marrs* guides the issue here. There the Court noted that if left to their own remedy, the Marrs family could prevent migration by creating their own low-pressure area; that is, producing from the "shield" wells. But because of the regulatory action at issue, plaintiffs were unable to operate their previously effective line of shield wells, and, therefore, unable to compete with or exclude the low-pressure areas to the north. The Court found this scheme implicated a plethora of constitutional issues: (i) the Texas Constitution, Article I, Section 17 (taking clause); Article I, Section 3 (equal protection); and Article I, Section 19 (due process) and (ii) the 14th Amendment to the U.S. Constitution (due process and equal protection). *Id*. at 949. The Court found it to be "the taking of one man's property and the giving it to another" in violation of the U.S. and Texas Constitutions. *Id*. The Court concluded: "[t]his 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." *Id. See also In Gulf Land Co.*, 131 S.W.2d at 80 and *Halbouty,* 357 S.W.2d at 374, both *supra* at Section I.B. of this Motion. The same is no less true here.

Creating rules that treat mineral rights owners in the same oil field (or landowners in the same aquifer) differently will always be unconstitutional. Plaintiff's challenge here, therefore, is

a facial challenge to the Rules because BVGCD's Rules changes cause an unconstitutional result without exception. The unconstitutional result is not dependent on any analysis of individual persons or situations. Plaintiff and every other landowner that applies to produce groundwater in an aquifer within the District under the New Rules will be treated differently than landowners producing groundwater in the same aquifer within the District under the Old Rules. As a result, landowners producing groundwater under the New Rules will be deprived of their undisputed *right* to produce their fair share of the groundwater beneath their land and the undisputed *right* to protect their land from being drained. No set of circumstances will alter this result. Even BVGCD agrees; there are no exceptions. Day Depo. (Exhibit C) at 53:7-22; 77:1-78:6; 150:3-15. Thus, there is no set of circumstances under which the effects of the Rules changes can be a valid exercise of BVGCD's power.

Interestingly, BVGCD does not pretend its Rules comply with *Gulf Land, Marrs, Halbouty,* and *Coyote Lake Ranch* and/or allow each District landowner a fair opportunity to produce his or her fair share of groundwater. In fact, Mr. Day, the BVGCD General Manager, expressed an unusual view of BVGCD's obligation to apply its Rules uniformly, admitting that the bifurcated application of the BVGCD Rules results in two "buckets" of permit holders: those who hold pre-September 14, 2023 permits and those who may apply for and receive post-September 14, 2023 permits. *Id*. at 267:8-268:15. Mr. Day further testified that the two "buckets" are not the same even though the aquifer is the same. *Id.*

In short, BVGCD's deprivation of Plaintiff's undisputed *right* to produce its fair share of the groundwater beneath its land and the deprivation of Plaintiff's undisputed *right* to protect its land from being drained, without compensation, constitutes a taking under the U.S. Constitution, 42 U.S.C. § 1983, and the Texas Constitution.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court (i) grant this Motion for Summary Judgment on Plaintiff's taking claim, (ii) declare BVGCD's September 14, 2023 Rules changes an unconstitutional taking, (iii) require BVGCD to repeal the New Rules and apply the Old Rules uniformly across all real property located in the District, and (iv) grant Plaintiff such other and further relief to which is entitled.

Date: April 10, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2026, I served a true and correct copy of Plaintiff's Motion for Summary Judgment on BVGCD's counsel via email and the Court's electronic filing system.

/s/ *Marvin W. Jones*
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