

**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 REPLY IN RE: ITS MOTION FOR SUMMARY JUDGMENT**

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**TO THE HONORABLE UNITED STATES DISTRICT COURT:**

*What has been will be again, what has been done will be done again;  
there is nothing new under the sun.*

*Ecclesiastes 1:9*

This case is about upholding constitutional principles and protecting Plaintiff’s *groundwater property rights* as part and parcel of the bundle of *rights* Plaintiff and every other Texas landowner has in his or her land. To be clear, this case is not about whether and to what extent Plaintiff exercised such rights. Nor is this case about the extent to which Plaintiff’s property may have been drained. Or the value of Plaintiff’s property. Those are red herring distractions conjured up by Defendant Brazos Valley Groundwater Conservation District (“BVGCD”)—yet again. There is nothing new under the sun.

There is but one issue here: whether BVGCD may simultaneously apply two disparate 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*. 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 does not dispute this simple truth. Plaintiff is entitled to summary judgment in its favor.

**UNDISPUTED KEY MATERIAL FACTS**

Cutting through the noise of BVGCD’s Response, here are the ten key material facts that BVGCD does not (and cannot) dispute.

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

2. BVGCD's Rules govern the production of groundwater within its jurisdiction (*i.e.*, Brazos and Robertson Counties, Texas, or the "District").

3. BVGCD's Rules create a correlative rights system (*i.e.*, the amount of groundwater a landowner may produce is tied directly to the amount of acreage owned or controlled). *See, e.g., Stratta v. Roe*, 961 F.3d 340, 360 (5th Cir. 2020).

4. As of September 14, 2023, BVGCD has two sets of Rules. One set (the Old Rules) governs groundwater production permitted before September 14, 2023. The other set (the New Rules) governs groundwater production permitted on or after September 14, 2023.

5. Plaintiff's tract of land at issue here is governed by the New Rules.

6. Under Old Rule 6.1(b)(2), all groundwater wells drilled 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.

7. Under New Rule 6.1(b)(2), which applies to Plaintiff's property, all new groundwater wells drilled in the District must be surrounded by two (2) feet of land per one GPM of average annual production rate or capacity.

8. As such, New Rule 6.1(b) reduces the amount of groundwater Plaintiff may produce from its land by 75%. Thornhill Decl. (Exhibit D), ¶ 8.

9. Stated alternatively, Plaintiff's *groundwater production rights* under the New Rules are worth 25% of what such *rights* were worth under the Old Rules.

10. Because commercially viable water wells in the District cost more than \$1 million to drill, BVGCD's New Rules render an economically feasible groundwater well impossible on Plaintiff's property.

## ARGUMENT AND AUTHORITY

Here are the ten key legal points that BVGCD does not address and/or dispute:

1. Whether *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012) applies to this case? It does. In Texas, groundwater is a landowner’s vested constitutionally protected private property right. *Id.* at 831; *see also Stratta v. Roe*, 961 F.3d 340, 354 (5th Cir. 2020) (a groundwater taking case in which BVGCD was a named defendant).<sup>1</sup> 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. In fact, 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<sup>2</sup> (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). *See also Stratta*, 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.

2. Whether *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1948)<sup>3</sup> applies to this case. It does. All groundwater rights owners are entitled to a fair opportunity to produce their fair

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<sup>1</sup> Not surprisingly, BVGCD does not reference or address *Stratta* anywhere in its Response.

<sup>2</sup> BVGCD does not reference or address TEX. WATER CODE § 36.002 anywhere in its Response.

<sup>3</sup> BVGCD does not reference or address *Elliff* anywhere in its Response.

share of the groundwater beneath their property. *Id.*, 210 S.W.2d at 562; *see also Day*, 369 S.W.3d at 831; *Stratta*, 961 F.3d at 360; *Texaco Prod. Inc. v. Fortson Oil Co.*, 798 S.W.2d 622 (Tex. App.—Austin 1990, no writ):

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.

3. Whether BVGCD may apply two different sets of Rules governing the production of groundwater across the District? It cannot. In fact, nowhere in its Response does BVGCD state that it is allowed to apply two different sets of groundwater production Rules across the District and why. Plaintiff challenges BVGCD to complete the following sentence: BVGCD is allowed to apply two different sets of groundwater production Rules across the District based on an arbitrary date because \_\_\_\_\_.

4. Whether *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73 (Tex. 1939)<sup>4</sup> applies to this case? It does. *Gulf Land Co.* holds that “[i]t 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).<sup>5</sup>

5. Whether *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944) applies to

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<sup>4</sup> BVGCD does not reference or address *Gulf Land Co.* anywhere in its Response.

<sup>5</sup> BVGCD does not reference or address *DeBardeleben* anywhere in its Response.

this case? It does. There, the Texas Supreme Court 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.*” *Id.* at 949 (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.

To BVGCD’s credit, it addressed *Marrs*—as it must—albeit awkwardly. Response at 21 (asserting that “Plaintiff very much wants this Court to do something that no Texas court has ever done: adopt and apply to *groundwater* the oil and gas rule from *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944)” and Plaintiff “fail[s] to acknowledge that no Texas court has ever applied the *Marrs* approach to groundwater.”). But BVGCD conveniently ignores *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016)<sup>6</sup> (see below) wherein the Texas Supreme Court explicitly held that oil and gas law is applicable to groundwater production. In fact, Texas oil and gas law has historically flowed from Texas water law. *Stratta* at 359. BVGCD’s position, therefore, not Plaintiff’s position, is the “novel” position. Response at 4.

6. Whether *Halbouty v. Railroad Commission*, 357 S.W.2d 364 (Tex. 1962)<sup>7</sup> applies to this case? It does. *Halbouty* holds that “[i]t 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

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<sup>6</sup> BVGCD does not reference or address *Coyote Lake Ranch* anywhere in its Response.

<sup>7</sup> BVGCD does not reference or address *Halbouty* anywhere in its Response.

to some other landowner in the reservoir a fair chance to produce the gas underlying his land.”  
*Id.* at 374.

7. Whether *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016) applies to this case? It does. While *Gulf Land, Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944), 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.” *Coyote Lake Ranch*, 498 S.W.3d at 64. Thus, the only logical conclusion that can be drawn from these seminal Texas Supreme Court opinions is that 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.

8. Whether Plaintiff’s right to exclude others from draining its property is also a constitutionally protected right and an actionable property interest? It is. The U.S. Supreme Court’s opinion in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) 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.”). 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.

9. Whether the New Rules governing the production of groundwater in the District negatively impact Plaintiff's *right* to a fair opportunity to produce its fair share of the groundwater underneath its land? They do—for the undisputed reasons set forth above.

10. Whether the New Rules governing the production of groundwater in the District negatively impact Plaintiff's *right* to a fair opportunity to prevent third parties from draining its property? They do—for the undisputed reasons set forth above.

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 New Rules cause an unconstitutional result without exception that does not depend on any analysis of individual persons or situations.

Plaintiff and every other landowner that applies to produce groundwater within the District under the New Rules will be treated differently from landowners producing groundwater 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. Even BVGCD agrees that 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 applying two different sets of groundwater production Rules across the District can be a valid exercise of BVGCD's power.

**CONCLUSION**

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, constitute takings under the U.S. Constitution, 42 U.S.C. § 1983, and the Texas Constitution. Accordingly, Plaintiff respectfully requests the Court to (i) grant summary judgment in favor of Plaintiff, (ii) declare that BVGCD's New Rules effect an unconstitutional taking on Plaintiff and its land, (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 it is justly entitled.

Date: May 15, 2026

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2026, I served a true and correct copy of Plaintiff's Reply in re: its Motion for Summary Judgment on BVGCD's counsel via email and the Court's electronic filing system.

/s/ Marvin W. Jones

Marvin W. Jones