

IN THE MATTER OF

CITY OF BRYAN

WELL NO. 18 AND BV-DO-003

§ BEFORE THE BRAZOS VALLEY

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GROUNDWATER

CONSERVATION DISTRICT

CITY OF BRYAN'S RESPONSE TO BVGRA COMPLAINT

I. Introduction

The Brazos Valley Groundwater Rights Association (“BVGRA”) and its member Tony Fazzino have filed a “complaint” requesting that the Brazos Valley Groundwater Conservation District (“BVGCD”) either revoke the City of Bryan’s Well No. 18 permit or involuntarily amend the permit to limit production to an amount that does not drain neighboring properties and deprive owners of their fair share of groundwater from the aquifer. This complaint is a thinly disguised attempt to reclassify Bryan’s Well No. 18 as a new well rather than an existing well in order to make it subject to the District’s acreage-base production rule. BVGRA’s prior effort to accomplish this same result was considered and rejected by the Board in 2013 when it ratified and reissued Bryan’s Well No. 18 permit. BVGRA’s “complaint” is without merit and should be summarily dismissed.

II. Existing Wells Are Not Subject to Acreage Requirement

BVGCD’s rules make a significant distinction between “existing wells” and “new wells”. The District’s spacing requirements and acreage based production requirements apply only to new wells, not existing wells.¹ This important distinction was noted by BVGCD’s general counsel when the Board first considered Bryan’s Well No. 18 permit on August 3, 2006: “they [existing wells] don’t have to meet the location requirements of spacing of the district and of getting the adequate acreage, but they do have to meet all production requirements.”²

III. Bryan’s Well No. 18 Is an Existing Well

BVGCD’s rules define “existing well” as “a groundwater well within the District’s boundaries, for which drilling or *significant development* of the well commenced before the effective date of these rules.”³ As noted by BVGCD’s general counsel, Bryan, College Station, and OSR Water Supply Corporation, all had wells that were considered existing wells “because

¹ BVGCD Rules 6.1;7.1

² Transcript, 8/03/06 BVGCD Board meeting at p. 12. See Attachment 1.

³ BVGCD Rule 1.1(12)(12/02/04); BVGCD Rule 1.1(15)(7/14/16)

they were well in the works before the rules were adopted.”⁴ In the City of Bryan’s case this significant development before the effective date of the rules consisted of acquiring the property, designing the well, obtaining TCEQ approval of the construction plans, awarding a construction contract to a water well drilling company, issuing a notice to proceed to the contractor and constructing site improvements needed to allow the drilling rig to be set up on the well site.

IV. BVGRA’s Procedural Irregularity Arguments are Time Barred

BVGRA argues that the original issuance of the Bryan’s Well 18 permit, more than ten years ago, is “replete with irregularities”. BVGRA alleges that notice was defective and that the Board never approved the hydrologic impact study required to authorize production from Well 18. BVGRA’s procedural arguments were previously considered and rejected by the BVGCD Board at its April 11, 2013 meeting when the manager’s approval of the hydrology report was ratified and the permit re-issued.⁵

Part of the stated basis for dismissing BVGRA’s arguments in 2013 was its failure to bring its allegations to the Board’s attention in a timely manner. This is consistent with the District’s rules which require the filing of a motion for a hearing within 20 days following the board’s decision on a matter that a party wishes to appeal⁶. BVGRA’s arguments about the Board’s original decision on Bryan’s permit were not timely in 2013 and they are even more untimely in 2017. Having failed to timely file a motion for rehearing and appeal, BVGRA’s “complaint” constitutes nothing more than an impermissible collateral attack on a lawfully issued permit.

V. Bryan’s Original Application.

BVGRA alleges that Bryan’s June 8, 2006 original application contains a false representation concerning the Well No. 18 completion date that conflicts with the state well drilling record. What BVGRA fails to tell the District is that Bryan’s submittal of its original application included not only the statement that BVGRA alleges is false, but also the state well drilling record cited in the “complaint” that provides the dates that drilling of Well No. 18 commenced and completed.⁷ The submittal of this official report with the application demonstrates transparency and is inconsistent with BVGRA’s assertion that the application falsifies critical information.

More importantly, BVGRA’s efforts to create an issue about when construction of Well No. 18 was completed is not legally relevant to the determination that Well No. 18 was

⁴ Transcript, 8/03/06 BVGCD Board meeting at p. 12. See Attachment 1.

⁵ See Attachment 2.

⁶ BVGCD Rule 14.8 (12/02/2004)

⁷ See Attachment 3.

an existing well that is not subject to the District's acreage-base production requirements. As noted previously, this determination was based the Districts assessment that Bryan's well was "a well in the works before the rules were adopted".

VI. Fazzino Has Not Been Deprived of Groundwater

The "complaint" alleges that Tony Fazzino owns 26.65 acres of land adjacent to the tract on which Bryan's Well No. 18 is located, and that groundwater beneath his property is being drained by Bryan's Well No. 18. It asks that BVGCD involuntarily amend Bryan's permit (more than 10 years after production commenced) to limit production so that neighboring properties are not deprived of their "fair share" of groundwater.

The records of the Brazos Valley Appraisal District show Mr. Fazzino's property to be near Bryan's Well No. 18 tract, but not adjacent. Those same records also show that Mr. Fazzino did not acquire his interest in his 26.65 acre tract until December 28, 2012, years after Bryan's well was permitted and began producing groundwater.

The complaint does not allege that Mr. Fazzino or any other property owner near Bryan's well 18 has ever requested and been denied a permit to produce groundwater from their own property. Unless a permit is requested and denied, any assertion of deprivation of groundwater lacks credibility.

VII. Conclusion

The City of Bryan has proceeded in good faith to develop and permit Well No. 18 as an existing well pursuant to the rules of the District. Bryan has now received its original permit and two permit renewals, and has operated Well No. 18 as an existing well for more than ten years. The repeated efforts of BVGRA to persuade the District to convert Well No. 18 from an existing well to a new well are baseless and should be summarily rejected. For the reasons set forth in this response Bryan asks that the "complaint" of BVGRA and Tony Fazzino be summarily dismissed.

Respectfully submitted,

MATHEWS & FREELAND, L.L.P.

By: 

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**ATTORNEYS FOR
THE CITY OF BRYAN**

CERTIFICATE OF SERVICE

I certify that on February 3, 2017, a copy of the foregoing pleading was served on all parties of record in this proceeding via hand delivery, email, facsimile, or United States Mail.


Jim Mathews

CC Douglas G. Caroom
Bickerstaff, Heath, Delgado, Acosta LLP
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Austin, TX 78746
Facsimile: (512)320-5638

ATTACHMENT 1

1 existing well?

2 MS. NORMAN: We -- we are encountering
3 the same situation with the past College Station well
4 that we've already permitted with the Bryan well and
5 with the OSR well that they were all considered existing
6 wells because they were well in the works before
7 these -- the rules were adopted. So they don't have to
8 meet the location requirements of spacing of the
9 district and of getting the adequate acreage, but they
10 do have to meet all production requirements. So it's
11 really a production permit. Not a drilling permit and
12 so --

13 UNIDENTIFIED MALE: (Inaudible) City of
14 Bryan (inaudible) question.

15 MS. NORMAN: We're discussing Bryan's
16 (inaudible) application right now, sorry.

17 MR. MCDONALD: All right. Now, the
18 people representing the City of Bryan are here and so if
19 y'all have questions about this proceeding or the
20 technical part, what we were discussing is this y'all.
21 We're going to grant this permit, but it's going to be
22 what we're now trying to clarify. We don't want to get
23 into too many semantics; but as you understand, it's a
24 conditional until its impact study is completed and then
25 the geological study is reviewed by the geologist that

ATTACHMENT 2

1 MR. RUSS: That's what I'm concerned
2 about. I'm concerned about these procedural questions
3 that may or may not be valid that should have been
4 raised at the time before the permit was issued.

5 Yes?

6 MR. MELVIN: Mr. President, thank you.
7 John Melvin, a Brazos Valley landowner. The problem is
8 that there wasn't proper notification for people to come
9 in and raise those questions.

10 MR. RUSS: John, we're seven years down
11 the road --

12 MR. MELVIN: I understand.

13 MR. RUSS: -- and it's really difficult.

14 MR. MELVIN: When things are done, if they
15 are not done in the open, that's the problem that gets
16 created. And you guys have an opportunity here at least
17 to postpone this thing and to do your homework and
18 review and see what's going on. But you have an
19 opportunity here to fix a problem as opposed to create a
20 bigger problem.

21 MR. RUSS: John, I can say to you that
22 we've taken great pains to try to have sunshine on this
23 Board.

24 MR. MELVIN: Oh, I understand, and it's

25 very much appreciated. But we're still, unfortunately,

1 having to deal with the past. The past created this
2 present.

3 MR. RUSS: How does one sitting on this
4 Board look at the city of Bryan, when the Board approved
5 it, even though there may have been defects in the
6 procedure seven years ago, and here we are seven years
7 later and want to revisit purported discrepancies in the
8 application or the way it was done when they have relied
9 on our permit?

10 MR. MELVIN: Well, I agree. I'm very
11 sympathetic to the situation that both OSR and the city
12 of Bryan are in.

13 MR. RUSS: That's a very --

14 MR. MELVIN: But there has not been --
15 there's no sympathy being sent in the direction of the
16 people who surround these wells that are impacted, and
17 they weren't properly notified --

18 MR. RUSS: John?

19 MR. MELVIN: -- this was going to be
20 happening. And now here we are looking at a set of
21 minutes and a recording that don't jibe and here we
22 have -- here we have this problem.

23 MR. RUSS: Let me just say this to you:
24 Your point is well taken, but there is absolutely no

25 reason to believe that if a landowner came to us today

1 that were somehow maybe impacted by this that they
2 wouldn't get a permit to drill their own well.

3 MR. MELVIN: So I can have -- if I'm a
4 neighbor to, say, the OSR well, I can go in and drill a
5 2,000 acre-foot well on my five acres?

6 MR. RUSS: I'm saying you can make your
7 application, and we will certainly take a look at it and
8 see.

9 MR. MELVIN: Because that's the problem
10 that you're going to be looking at.

11 MR. RUSS: I understand.

12 MR. MELVIN: All right.

13 MR. RUSS: I understand.

14 MR. BOYKIN: Mr. President, for

15 clarification we're discussing the Bryan well, which --
16 at this time, which was, in fact, an existing well at
17 the time that the rules were adopted in the first place.

18 MR. RUSS: That's my understanding of the
19 facts.

20 MR. BOYKIN: So --

21 MR. McDONALD: I call the question.

22 MR. RUSS: Any other discussion, David?

23 MR. STRATTA: No.

24 MR. RUSS: I'll entertain a motion.

MR. HARRIS: I move that we approve.

1 MR. RUSS: I have a motion.

2 MR. WATSON: Second.

3 MR. RUSS: Is there a second?

4 MR. WATSON: Second.

5 MR. RUSS: I have a motion and a second to
6 approve the ratification of this hydrological study for
7 the city of Bryan well. All in favor signify by raising
8 your right hand and saying "aye."

9 (All those in favor of the motion so
10 responded)

11 MR. RUSS: All opposed by like sign.

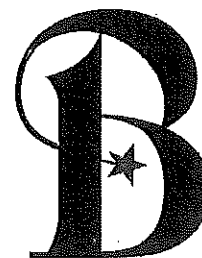
12 (All those in opposed of the motion so
13 responded)

14 MR. RUSS: One opposed. The motion passes
15 and one abstention.

16 We're going to go to the Wellborn OSR
17 well. It is a ratification approval of the related
18 hydrology study for that particular well. Any
19 discussion, gentlemen?

20 MR. WATSON: Mr. Chairman, I think the
21 discussion is very similar to what the city of Bryan
22 discussion was. The report was issued. The engineer
23 looked at it, approved it. We issued a permit. We
24 reissued it four more times, and I move that we --

ATTACHMENT 3



CITY OF BRYAN
The Good Life, Texas Style.

June 8, 2006

Mr. Bill Riley
General Manager
Brazos Valley Groundwater Conservation District
P.O. Box 528
Hearne, TX 77859

Subject: City of Bryan
Water Well No. 18
Application for Operating Permit and TCEQ Completion Data for
Interim Approval

Dear Mr. Riley:

Transmitted with this letter is an Application for Operating Permit for Well No. 18 and a copy of the submittal recently prepared and submitted to the TCEQ to satisfy the TCEQ Completion Data for Interim Approval. Well No. 18 is located at the intersection of Old San Antonio Road and Peyton Road in Brazos County. We are transmitting this information to the District for approval and record purposes.

The pipeline that will connect Well No. 18 to the City of Bryan well collection system is under construction and the well will be able to be put into regular operation when the pipeline is complete. If the District requires any additional information prior to the well being put into regular operation, please contact me.

Sincerely,

Kelly Wellman
Environmental Services Director

cc: Paul Kaspar, City of Bryan
Charles Rhodes, City of Bryan
Allen Woelke, CDM

Enclosures

City of Bryan

Water Well No. 18
TCEQ Completion Data for Interim Approval

May 2006

STATE OF TEXAS WELL REPORT for Tracking #71146

Owner:	City of Bryan Well No. 18	Owner Well #:	No Data
Address:	P.O. Box 1000 Bryan, TX 77805	Grid #:	59-21-1
Well Location:	OSR & Peyton Road Bryan, TX	Latitude:	30° 43' 40" N
Well County:	Brazos	Longitude:	096° 28' 31" W
Elevation:	No Data	GPS Brand Used:	Magellan 315

Type of Work:	New Well	Proposed Use:	Public Supply; Plans Approved by TCEQ
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Drilling Date: Started: 12/8/2004
Completed: 10/8/2005

Diameter of Hole: Diameter: 36 in From Surface To 100 ft
Diameter: 24 in From 0 ft To 800 ft
Diameter: 16 in From 800 ft To 2322 ft

Drilling Method: Mud Rotary

Borehole Completion: Gravel Packed From: 2770 ft to 2127 ft
Gravel Pack Size: 12-20 Underreamed

Annular Seal Data: 1st Interval: From 0 ft to 190 ft with 257-Cement (#sacks and material)
2nd Interval: From 0 ft to 2322 ft with 2256-cement (#sacks and material)
3rd Interval: No Data
Method Used: Halliburton
Cemented By: Advanced Oil Svc
Distance to Septic Field or other Concentrated Contamination: No Data
Distance to Property Line: No Data
Method of Verification: No Data
Approved by Variance: No Data

Surface Completion: Surface Slab Installed

Water Level: Static level: 220.75 ft. below land surface on 11/1/2005
Artesian flow: No Data

Packers: none

Plugging Info: Casing or Cement/Bentonite left in well: No Data

Type Of Pump: Turbine
Depth to pump bowl: 500 ft

Well Tests: Pump
Yield: 3503 GPM with 93.92 ft drawdown after 36 hours

Water Quality: Type of Water: Desirable
Depth of Strata: 2328-2750 ft.
Chemical Analysis Made: Yes
Did the driller knowingly penetrate any strata which contained undesirable constituents: No

Certification Data: The driller certified that the driller drilled this well (or the well was drilled under the driller's direct