IN THE MATTER OF

CITY OF BRYAN

WELL NO. 18 AND BV-DO-003

§ BEFORE THE BRAZOS VALLEY
§ 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.⁴ 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 or 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

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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)(714/16)
they were well in the works before the rules were adopted." 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

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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:  
Jim Mathews  
State Bar No. 13188700  
8140 North MoPac Expressway  
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Austin, TX 78759  
Telephone (512) 404-7800  
Facsimile (512) 703-2785  
jmathews@mandf.com

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
3711 S. Mopac Expy., Suite 1-300
Austin, TX 78746
Facsimile: (512)320-5638
ATTACHMENT 1
existing well?

MS. NORMAN: We -- we are encountering

the same situation with the past College Station well

that we've already permitted with the Bryan well and

with the OSR well that they were all considered existing

wells because they were well in the works before

these -- the rules were adopted. So they 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. So it's

really a production permit. Not a drilling permit and

so --

UNIDENTIFIED MALE: (Inaudible) City of

Bryan (inaudible) question.

MS. NORMAN: We're discussing Bryan's

(inaudible) application right now, sorry.

MR. MCDONALD: All right. Now, the

people representing the City of Bryan are here and so if

y'all have questions about this proceeding or the

technical part, what we were discussing is this y'all.

We're going to grant this permit, but it's going to be

what we're now trying to clarify. We don't want to get

into too many semantics; but as you understand, it's a

conditional until its impact study is completed and then

the geological study is reviewed by the geologist that
MR. RUSS: That's what I'm concerned about. I'm concerned about these procedural questions that may or may not be valid that should have been raised at the time before the permit was issued.

Yes?

MR. MELVIN: Mr. President, thank you.

John Melvin, a Brazos Valley landowner. The problem is that there wasn't proper notification for people to come in and raise those questions.

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

MR. MELVIN: I understand.

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

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

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

MR. MELVIN: Oh, I understand, and it's
very much appreciated. But we're still, unfortunately,
having to deal with the past. The past created this present.

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

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

MR. RUSS: That's a very --

MR. MELVIN: But there has not been --

there's no sympathy being sent in the direction of the people who surround these wells that are impacted, and they weren't properly notified --

MR. RUSS: John?

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

MR. RUSS: Let me just say this to you:

Your point is well taken, but there is absolutely no
reason to believe that if a landowner came to us today
that were somehow maybe impacted by this that they wouldn't get a permit to drill their own well.

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

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

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

MR. RUSS: I understand.

MR. MELVIN: All right.

MR. RUSS: I understand.

MR. BOYKIN: Mr. President, for clarification we're discussing the Bryan well, which -- at this time, which was, in fact, an existing well at the time that the rules were adopted in the first place.

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

MR. BOYKIN: So --

MR. MCDONALD: I call the question.

MR. RUSS: Any other discussion, David?

MR. STRATTA: No.

MR. RUSS: I'll entertain a motion.
MR. HARRIS: I move that we approve.
MR. RUSS: I have a motion.

MR. WATSON: Second.

MR. RUSS: Is there a second?

MR. WATSON: Second.

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

(All those in favor of the motion so responded)

MR. RUSS: All opposed by like sign.

(All those in opposed of the motion so responded)

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

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

MR. WATSON: Mr. Chairman, I think the discussion is very similar to what the city of Bryan discussion was. The report was issued. The engineer looked at it, approved it. We issued a permit. We reissued it four more times, and I move that we --
ATTACHMENT 3
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,

[Signature]
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

<table>
<thead>
<tr>
<th>Owner: City of Bryan Well No. 18</th>
<th>Owner Well #: No Data</th>
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<tbody>
<tr>
<td>Address: P.O. Box 1000</td>
<td>Grid #: 59-21-1</td>
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<tr>
<td>Bryan, TX 77805</td>
<td></td>
</tr>
<tr>
<td>Well Location: OSR &amp; Peyton Road</td>
<td>Latitude: 30° 43' 40&quot; N</td>
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<tr>
<td>Bryan, TX</td>
<td></td>
</tr>
<tr>
<td>Well County: Brazos</td>
<td>Longitude: 096° 28' 31&quot; W</td>
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<tr>
<td>Elevation: No Data</td>
<td>GPS Brand Used: Magellan 315</td>
</tr>
</tbody>
</table>

| Type of Work: New Well           | Proposed Use: Public Supply; Plans Approved by TCEQ |

| 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 |

<table>
<thead>
<tr>
<th>Drilling Method: Mud Rotary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Borohole: Gravel Packed From: 2770 ft to 2127 ft</td>
</tr>
<tr>
<td>Completion: Gravel Pack Size: 12-20 Underreamed</td>
</tr>
</tbody>
</table>

| 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 |
| Ariesian flow: No Data |

| Packers: none |

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

<table>
<thead>
<tr>
<th>Type Of Pump: Turbine</th>
</tr>
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<tbody>
<tr>
<td>Depth to pump bowl: 500 ft</td>
</tr>
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<table>
<thead>
<tr>
<th>Well Tests: Pump</th>
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<tbody>
<tr>
<td>Yield: 3503 GPM with 50.82 ft drawdown after 36 hours</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Water Quality: Type of Water: Desirable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Depth of Static: 2326-2750 ft.</td>
</tr>
<tr>
<td>Chemical Analysis Made: Yes</td>
</tr>
<tr>
<td>Did the driller knowingly penetrate any strata which contained undesirable constituents: No</td>
</tr>
</tbody>
</table>

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

12/15/2005