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

DAVID STRATTA and ANTHONY FAZZINO *Plaintiffs*	§ § § § §	
V.	§	CASE NO. 6:18-cv-00114
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.*	§ § § § § § § § § § §	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COME Plaintiffs, DAVID STRATTA ("Stratta") and ANTHONY FAZZINO ("Fazzino") (collectively "Plaintiffs") and file this Original Complaint against Defendants JAN A. ROE, BILLY L. HARRIS, BRYAN F. RUSS. JR., JAYSON BARFKNECHT, MARK J. CARRABBA, GORDON PETER BRIEN and STEPHEN C. CAST ("Individual Defendants"), in their individual capacities and in their official capacities as directors of the Brazos Valley Groundwater Conservation District ("Director Defendants"), and THE BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT ("Defendant District" or "District") alleging as follows:

I.
PARTIES

1. Plaintiff DAVID STRATTA is an individual resident of the State of Texas who resides in Robertson County, Texas.

2. Plaintiff ANTHONY FAZZINO is an individual resident of the State of Texas who resides in Brazos County, Texas.

3. Defendant JAN A. ROE ("Defendant Roe") is an individual who resides in Robertson County, Texas, and serves as President of the Board of Directors of the District. Defendant Roe may be served with process at 202 Hughes Cut Off Rd., Franklin, Texas 77856 or wherever she may be found. Defendant Roe is sued in her individual capacity and in her official capacity.

4. Defendant BILLY L. HARRIS ("Defendant Harris") is an individual who resides in Brazos County, Texas, and serves as a member of the Board of Directors of the District. Defendant Harris may be served with process at 1207 Mariners Cv., College Station, Texas 77845-8762 or wherever he may be found. Defendant Harris is sued in his individual capacity and in his official capacity.

5. Defendant BRYAN F. RUSS, JR. ("Defendant Russ") is an individual who resides in Robertson County, Texas, and serves as a member of the Board of Directors of the District. Defendant Russ may be served with process at 7191 S FM 46, Hearne, Texas 77856-3918 or wherever he may be found. Defendant Russ is sued in his individual capacity and in his official capacity.

6. Defendant JAYSON BARFKNECHT ("Defendant Barfknecht") is an individual who resides in Brazos County, Texas, and serves as a member of the Board of Directors of the District. At relevant times, Defendant Barfknecht also served as the Public Works Director for

the City of Bryan. Defendant Barfknecht may be served with process at 9324 Weedon Loop, Bryan, Texas 77808-6712 or wherever he may be found. Defendant Barfknecht is sued in his individual capacity and in his official capacity.

7. Defendant MARK J. CARRABBA ("Defendant Carrabba") is an individual who resides in Brazos County, Texas, and serves as a member of the Board of Directors of the District. Defendant Carrabba may be served with process at 4045 Austins Lndg., Bryan, Texas 77808-9058 or wherever he may be found. Defendant Carrabba is sued in his individual capacity and in his official capacity.

8. Defendant GORDON PETER BRIEN ("Defendant Brien") is an individual who resides in Robertson County, Texas, and serves as a member of the Board of Directors of the District. Defendant Brien may be served with process at 11110 Hummingbird Lane, Hearne, Texas 77859-3786 or wherever he may be found. Defendant Brien is sued in his individual capacity and in his official capacity.

9. Defendant STEPHEN C. CAST ("Defendant Cast") is an individual who resides in Brazos County, Texas, and serves as a member of the Board of Directors of the District. Defendant Cast may be served with process at 15561 Whites Creek (Pvt) Ln., College Station, Texas 77845 or wherever he may be found. Defendant Cast is sued in his individual capacity and in his official capacity.

10. Defendant the BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT ("Defendant District") is a political subdivision of the State of Texas that may be served with process by serving its President, Jan A. Roe, or its General Manager, Alan Day at 112 West 3rd Street, Hearne, Texas 77859.

11. The Director Defendants each took an oath of office that they would "to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State." To the extent that the actions of the Director Defendants as described below violated the Constitutional rights of Plaintiffs, such actions did not conform to their constitutional obligations. Put differently, violating the constitutionally protected rights of Plaintiffs was and is a violation of Director Defendants' constitutional obligations.

II.
JURISDICTION AND VENUE

12. This Court has jurisdiction over this case pursuant to 28 U.S.C.A. § 1331 and 28 U.S.C.A. § 1343 because this action is brought to enforce Plaintiffs' civil rights under 42 U.S.C.A. § 1983, and the First, Fifth and Fourteenth Amendments of the United States Constitution.

13. Venue is proper in this court pursuant to 28 U.S.C.A. § 1391(b) because Defendant District has its principle office or place of business in Hearne, Robertson County, Texas, which is within the Waco Division of the Western District of Texas. One of more of the other Defendants reside in Western District of Texas, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within the boundaries of the Western District of Texas.

III.
FACTUAL BACKGROUND

14. Plaintiff Stratta is a landowner and farmer with land and farming operations within the jurisdictional boundaries of Defendant District. Plaintiff Stratta is also a member of the Board of Directors of Defendant District.

15. Plaintiff Fazzino is a landowner whose land is within the jurisdictional boundaries of Defendant District.

16. On December 2, 2004, Defendant District promulgated new rules ("Rules") to govern the production of groundwater from the Simsboro formation within the District's boundaries. The Rules made a distinction between Existing Wells, New Wells and wells with Historic Use. An Existing Well was defined as a well for which drilling or significant development of the well commenced before the effective date of the Rules.

17. Wells in Defendant District's jurisdiction were subject to two specific regulations: spacing requirements and production limits. Spacing requirements were set forth in Rule 6.1, applicable only to New Wells. Under that rule, a well with the productive capacity of City of Bryan Well No. 18 were subject to spacing equal to 1 foot per 1 gallon per minute of average annual production rate or capacity from a well in the Simsboro formation. Pursuant to Rule 6.1, wells must be spaced from one another to "minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality and to prevent waste."

18. Production limits were generally imposed on Historic Use Wells according to the amount of groundwater that had been actually beneficially used prior to the effective date. There were no clearly defined production limits for Existing Wells that had no established Historic Use. Production limits for New Wells were found in Rule 7.1, which set forth a formula to determine production limits based on contiguous acres. Rule 7.1 established maximum allowable production regulations designed to accomplish the same goals articulated in Rule 6.1. Under Rule 7.1(c), production is limited by the contiguous acres assigned to the well, a majority of which contiguous acreage "shall bear a reasonable reflection of the cone of depression impact

near the pumped well, as based on the best available science." The formula set forth in the District's Rule 7.1 imposed a production limit on New Wells only based on an equation stated as follows: (the square of the product of the average annual production rate in gallons per minute times the District spacing requirement between wells) multiplied by pi, with the result divided by 43,560. The formula requires 649 contiguous acres surrounding a New Well producing 3,000 gallons per minute ("GPM"), which equates to a circle around the well with a radius of 3,003 feet in all directions. Put differently, and according to the District's purported "best available science," a well producing 3,000 GPM will create a cone of depression impact around the pumped well for approximately 3,003 feet in all directions thereby affecting all groundwater resources in the Simsboro aquifer within a circle with an area equal to 649 acres.

19. As noted above, Existing Wells were not subject to the spacing requirements or acreage requirements of Rules 6.1 and 7.1.

20. On December 8, 2004, the City of Bryan began actual drilling of Well No. 18, finally completing the well on October 28, 2005. There was no actual annual withdrawal of groundwater from Well No. 18 prior to December 2, 2004. Therefore, Well No. 18 had no "Historic Use" amount associated with it. [1]

21. On June 8, 2006, the City of Bryan, Texas, filed an application for a permit to operate a well designated as Well No. 18, producing groundwater at 3,000 GPM from a 2.7 acre tract closer than 3,000 feet from the property owned by Plaintiff Fazzino. If Well No. 18 was a New Well and the City of Bryan owned or controlled only 2.7 surrounding acres, Rule 7.1 would allow production of only 192 GPM, not 3,000 GPM. Because Well No. 18 had no Historic Use amount of production prior to the effective date of the December 2, 2004 Rules, it therefore had

[1] Rule 1.1(16) of the 2004 Rules of the District defined "Historic Use" as "the highest annual amount of water withdrawn from an active groundwater well in the District for an actual beneficial use, prior to the adoption date of the District's first set of Rules." *See* District Rules effective December 2, 2004 at Rule 1.1(16).

no "highest annual amount of water withdrawn" to support production of any amount. Therefore, if Well No. 18 was an Existing Well, there was (and is) no clearly defined spacing requirement or production limit under the Rules.

22. On August 8, 2006, the District held a meeting of its Board of Directors. On the agenda for that meeting was approval of an operating permit for a "new well" for the City of Bryan, being Well No. 18.

23. On February 20, 2007, the District "conditionally" granted a permit for Well No. 18, which permit authorized the City of Bryan to produce 4,838 acre-feet per year of groundwater at a rate of 3,000 GPM. According to the District's alleged best available science, Well No. 18 is impacting groundwater resources in a cone of depression that stretches 6,000 feet across—a 3,003 foot radius in all directions from the well bore—affecting an area equal to 649 acres around the well.

24. On April 17, 2013, the District granted another "conditional" permit to City of Bryan to operate Well No. 18, again at a rate of 3,000 GPM. The City of Bryan still owned only 2.7 acres surrounding this well, and Rule 7.1, if applied to Well No. 18, would still allow production of only 192 GPM.

25. On January 30, 2017, Plaintiff Fazzino filed a complaint with the Defendant District, asserting that Well No. 18 was not properly permitted because it was not a Historic Well under the rules of the District and should not be exempted from the production limitations imposed on all New Wells, and asserting that the District should initiate proceedings to reduce its production authorization. That complaint was referred for hearing to the State Office of Administrative Hearings ("SOAH"). The SOAH judge found that Plaintiff Fazzino was not authorized to assert a complaint relating to a third party owned well. The administrative process

related to that complaint is therefore completed or will soon be completed.

26. On April 4, 2017, Plaintiff Fazzino filed an application for a drilling/operating permit from the District. Plaintiff Fazzino's application noted that he owned or controlled an interest in 26 acres of groundwater rights and requested a permit to produce 3,000 GPM in order to offset the production from Well No. 18.

27. On April 13, 2017 and June 26, 2017, the District, through its duly authorized general manager, advised Plaintiff Fazzino that his application was administratively incomplete because he had failed to demonstrate that he owned or controlled sufficient acreage around his proposed well to support production of 3,000 GPM, noting that he would need 649 acres to support the requested production.

28. On August 16, 2017, Plaintiff Fazzino wrote the District, advising the District that he did not own or control 649 acres and could not provide documentation for that amount of property. Plaintiff Fazzino again noted that 3,000 GPM was the minimum amount of production he needed to offset the production of the neighboring Well No. 18, and requested a variance from the application of the District's spacing and production rules.

29. On September 6, 2017, the District, through its general manager, advised Plaintiff Fazzino that his application had lapsed due to his failure to provide the requested information regarding sufficient property to support production of 3,000 GPM. That same communication stated that the District does not grant variances.

30. The District's Rules do not provide any mechanism for an administratively incomplete application for a drilling/operating permit to be brought before the Board of Directors for action.

31. The status of Well No. 18 as an Existing Well or New Well was the subject of controversy and confusion beginning in 2013, when the permit for that well was up for renewal. During that process, and subsequently, the District's treatment of the owner of Well No. 18 has been inconsistent with its treatment of the owners of similarly situated wells. The District's one consistency in application of its rules is found in its treatment of other municipal water supply entities such as the City of College Station, Wickson Creek Special Utility District, Brazos Valley Water Supply Company, and OSR Water Supply Corporation. These other entities own wells similar to Well No. 18 in the sense that such wells are located on small tracts of land and produce disproportionate amounts of water compared to these tiny tract sizes. If the District applied Rules 6.1 and 7.1 to the Cities of Bryan and College Station, Wickson Creek Special Utility District, Brazos Valley Water Supply Company, and OSR Water Supply Corporation, their wells would be severely limited in terms of production, or those entities would be required to acquire much larger parcels of groundwater rights surrounding their wells. But the District has not applied its rules equally to those entities as compared to owners of New Wells or to applicants for New Wells such as Plaintiff Fazzino. Not coincidentally, the Cities of Bryan and College Station, Wickson Creek Special Utility District, Brazos Valley Water Supply Company, and OSR Water Supply Corporation have significant ties to Defendant District—these entities are led or owned by, or employ, present or former directors of Defendant District.

32. Prior to March 8, 2018, Plaintiff Stratta, as a member of the Board of Directors of Defendant District, attempted to address the District's disparate and unequal application of its rules to Well No. 18, but his efforts have been consistently thwarted by Defendants. On March 8, 2018, the District had a regularly scheduled meeting of its Board of Directors. In the days prior to the meeting, Plaintiff Stratta requested that the agenda for the March 8, 2018 meeting include

an item to discuss whether Well No. 18 was an Existing Well or a New Well. Plaintiff Stratta was told by Board President Defendant Roe that such a discussion might affect pending litigation, and there would be no such agenda item. Plaintiff Stratta then called Defendant Russ, who told Plaintiff Stratta that he should not discuss the topic of Well No. 18.

33. On March 8, 2018, Plaintiff Stratta attended the meeting of the Board of Directors, but signed into the meeting as a member of the public, and signed and submitted a "Registration Form," indicating that he was a landowner in Brazos and Robertson counties and wished to make a public comment on an "open" agenda item. Plaintiff Stratta intended at that time to make a public comment requesting that the Board include the subject of the status of Well No. 18 on its next agenda.

34. On receiving Plaintiff Stratta's "Registration Form," Defendant Roe turned to general counsel for the Board and asked if Plaintiff Stratta could make a public comment. The general counsel said that she had already researched that question and that "directors" could not speak because he could not discuss things that are not on the agenda, even though the agenda listed "Public Comment" as an item and listed "Non-agenda items" as a specific type of public comment. Defendant Roe then began the meeting without calling on Plaintiff Stratta for public comment, denying Plaintiff Stratta the right to express his views.

IV.
DEPRIVATION OF FIRST AMENDMENT RIGHTS
UNDER COLOR OF STATE LAW

35. Under the Texas Open Meetings Act, TEX. GOV'T CODE § 551, a governmental body such as Defendant District is not required to allow public comment at a public meeting. However, if a government body allows public comment, then it must act reasonably and may not discriminate on the basis of particular views expressed, or arbitrarily deny citizens their right to

apply to the government for redress of grievances. Nor may a governmental body unfairly discriminate among views seeking expression.

36. Plaintiff Stratta, as a landowner and citizen, sought the opportunity to publicly address the Board to request that Well No. 18 be made the subject of an agenda item at the next meeting. While his viewpoint did not and does not meet with the approval of the Defendants, his right to speak attached when the District decided years ago to allow public comment. The District has in fact routinely allowed public comment at its meetings, and has allowed other Directors to make public comments in the past. Defendants' conduct in depriving Plaintiff Stratta of his right to speak at this public meeting was content-directed, and violated his fundamental rights under the First Amendment of the U.S. Constitution under color of state law, in violation of 42 U.S.C.A. § 1983.

37. Defendants Roe and Russ engaged in a conspiracy to violate Plaintiff Stratta's First Amendment rights by planning and concurring in the plan to refuse to allow him to speak as a member of the public at the March 8, 2018 meeting of the Board of Directors.

38. The Individual Defendants are "persons" within the meaning of 42 U.S.C.A. § 1983. *Will v. Michigan Dep't of State Police,* 491 U.S. 58 (1989); *Hart v. Walker,* 720 F.2d 1443, 1445 (5th Cir. 1983). The Board members possess the final authority and ultimate repository of District power. *Id.*; *Brown v. Board of the County Commissioners of Bryan County, Oklahoma*, 67 F.3d 1174, 1182-83 (5th Cir. 1995); *See* TEX. WATER CODE §36.051 ("the governing body of the district is the board of directors."). All Defendants are subject to liability, either as directors or individually or both, under 42 U.S.C.A § 1983. All defendants are subject to the Court's judgment for prospective relief. *Will, supra.*

39. It is well settled law and all Defendants are objectively and actually aware that the First Amendment to the U.S. Constitution protects freedom of speech. All Defendants are objectively and actually aware that depriving a person of his right to free speech is a violation of the First Amendment to the U.S. Constitution. A reasonable person in the position of Defendants would have realized that their content-based restriction on Plaintiff Stratta's right to speak violated his constitutional rights.

40. Plaintiff Stratta seeks prospective injunctive relief, prohibiting all Defendants from depriving him of his rights under the First Amendment to the U.S. Constitution. Plaintiff Stratta has not suffered specific monetary damages as a result of his deprivation of his First Amendment rights. Plaintiff Stratta requests that the jury award nominal damages against the Individual Defendants for such violation, and that the jury award punitive damages to punish the Individual Defendants for their conduct and to deter others similarly situated as Defendants from similar outrageous conduct.

V.
DEPRIVATION OF EQUAL PROTECTION UNDER COLOR OF STATE LAW

41. Defendants are engaged in a conspiracy to prevent inquiry into and to protect the status of Well No. 18. The status of Well No. 18 is critical to the City of Bryan and its Public Works Director, Defendant Barfknecht, because the City has expended public funds to drill and equip the well, and any finding or holding that the City should be limited to 192 GPM would result in the likely abandonment of such well as a viable source of municipal water. Alternatively, such a finding or holding would require the City to obtain sufficient property rights to support 3,000 GPM of production, causing the City to purchase water rights from the owners of the surrounding 646.3 acres. Further, Defendants have conspired to prevent other

groundwater rights owners such as Fazzino to produce amounts equal to those produced by the City of Bryan because such production would, according to the District's best available science, adversely impact the production from Well No. 18.

42. Over the course of the history of Defendant District, its directors, including Director Defendants, have engaged in a pattern of conduct designed to prevent production of groundwater by some owners while allowing such production from others such as the City of Bryan. Defendants have applied and interpreted the Rules in an inconsistent and contradictory manner, in an effort to protect certain producers from others.

43. Defendants' conduct is designed to protect the City of Bryan's Well No. 18 from being subject to the production limitations applicable to Plaintiff Fazzino, or to protect Well No. 18 from being offset by production by Fazzino. Defendants' conduct is also designed to protect other municipal water suppliers such as the City of College Station, Wickson Creek Special Utility District, Brazos Valley Water Supply Company, and OSR Water Supply Co. who have similarly producing wells on very small tracts of land that would not support their production if the District applied Rules 6.1 and 7.1 to those wells. Defendants have effectively conspired to allow these municipal suppliers to take water from Fazzino and others similarly situated, and to prevent Fazzino and others similarly situated from interfering with these "protected" wells by drilling offset wells.

44. Groundwater in place, beneath the surface of the land, in Texas is a constitutionally protected property right under the U.S. and Texas Constitutions. *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012); TEX. WATER CODE § 36.002. Groundwater rights are a valuable and fundamental attribute of private property ownership in Texas. *Day*, 369 S.W.3d at 814; *Houston and Texas Central Railroad Co. v. East*, 81 S.W. 279 (Tex. 1904); *Texas Co. v. Burkett*,

296 S.W. 273, 278 (Tex. 1927); *City of Corpus Christi v. City of Pleasanton*, 276 S. W.2d 798 (Tex. 1955); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972); *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 25-27 (Tex. 1978); *City of Sherman v. PUC*, 643 S.W.2d 681, 686 (Tex. 1983); *Moser v. United States Steel*, 676 S.W.2d 99, 102 (Tex. 1984); *Gifford-Hill & Co. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 815n.6 (Tex. 1992); *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75, 79 (Tex. 1999); *see Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118 (Tex. App.—San Antonio 2013, pet. denied); *Pecos County WCID No. I v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.); *Bartley v. Sone*, 527 S.W.2d 754, 759-60 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613, 617-618 (Tex. App.—San Antonio 2008, pet. denied); *see also* U.S. Const. Amend. V, XIV; TEX. CONST. ART. I, §17; TEX. WATER CODE § 36.002; *see generally* W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS, 556-572 (1961); Drummond, Sherman & McCarthy, *The Rule of Capture in Texas-Still Misunderstood After All of These Years*, 37 Tex. Tech. L. Rev. 1 (2004); Jones & Little, *The Ownership of Groundwater in Texas: A Contrived Battle For State Control of Groundwater*, 61 Baylor Law Rev. 578 (2009).

45. Chapter 36 of the Texas Water Code, from which the Defendants derive their existence and authority, expressly recognizes and adopts the common law rule vesting ownership of groundwater in landowners. TEX. WATER CODE § 36.002. Section 36.002 states in pertinent part that a landowner, including lessees and assigns, "owns the groundwater below the surface of the landowner's land as real property'' and that "[n]othing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section." TEX. WATER CODE

§ 36.002(a), (c), (emphasis added). Allowing the City of Bryan to produce large amounts of groundwater while refusing to allow Plaintiff Fazzino the same opportunity to produce his fair share effectively deprives Plaintiff Fazzino and others similarly situated of their right to Equal Protection under the Fourteenth Amendment to the U.S. Constitution. Such deprivation of Equal Protection has been done under color of state law, in violation of 42 U.S.C.A. § 1983.

46. Owners of groundwater rights in the same aquifer must be treated equally under Texas law. *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944). [2] The District's Rules attempt to differentiate between types of wells based on the date on which they were drilled or produced, or the use of the water from such wells. The disparate treatment of owners of wells based on use of the water or the date of drilling or production is arbitrary and results in deprivation of Equal Protection to all groundwater rights owners in the jurisdictional boundaries of the District. To the extent the District's Rules inherently violate the Equal Protection Clause of the Fourteenth Amendment, this Court should hold that such Rules are void.

47. Plaintiffs request that Court prospectively enjoin Defendants from continuing to deprive Plaintiff Fazzino of his right to Equal Protection under the law.

VI.
TAKING PRIVATE PROPERTY WITHOUT COMPENSATION UNDER COLOR OF STATE LAW

48. Plaintiff Fazzino owns an undivided interest in 26.65 acres of real property located in Brazos County Texas. Under Texas law, Plaintiff owns the groundwater beneath this 26.65 acre tract, including the groundwater located in the Simsboro aquifer. Plaintiff Fazzino's property is within 3,003 feet from Well No. 18. By the District's own admission, the groundwater belonging to Plaintiff Fazzino is within the "cone of depression impact" of Well No. 18 and is

[2] The Texas Supreme Court has explicitly approved the application of oil and gas law to appropriate disputes involving groundwater. *Day,* at 831; *Coyote Lake Ranch v. City of Lubbock,* 498 S.W.3d 53 (Tex. 2016).

therefore being impacted by production from that well. Because Plaintiff's property is within the cone of depression of Well No. 18, the purposes of Rule 6.1 are not being met by the District.

49. Plaintiff Fazzino's vested property right to produce and beneficially use groundwater from his property may be subject to reasonable regulation to prevent waste or subsidence, or to serve some other legitimate governmental interest; however, such right may not be arbitrarily interfered with or damaged by officials acting under color of state or local law who are catering to their own biases, local political pressure or personal animosity rather than faithfully carrying out the legitimate duties of their office. U.S. Const. Amend. V and XIV; TEX. CONST. ART. I, § 17; *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012).

50. All groundwater rights owners are entitled to a fair opportunity to produce their fair share of the groundwater beneath their property. *Day* at 831; *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1949). Any denial of the right to a fair chance to produce a fair share of groundwater amounts to confiscation. *Marrs, supra.* It is the duty of a regulatory body such as the Defendant District to protect property rights of landowners by making exceptions to spacing rules 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).

51. Because groundwater is a landowner's property, any order, regulation, or act that takes, damages, or destroys that property right without compensation is prohibited by the Fifth Amendment to the United States Constitution and by Section 17 of Article I of the Texas Constitution. *Marrs* at 949.

52. The District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its small tract of land results in depriving Plaintiff of his fair

chance to produce a fair share of the groundwater. *Halbouty v. Railroad Commission*, 357 S.W.2d 364 (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.") Because of the District's unequal application of its rules, Plaintiff Fazzino cannot offset or mitigate the impact of Well No. 18 on the groundwater beneath his property. Therefore the District's regulatory scheme as applied to Plaintiff Fazzino has resulted in a taking of his Constitutionally protected property without compensation to him, in direct violation of the United States Constitution.

53. Plaintiff Fazzino is entitled to judgment that the Rules of the District are invalid and void to the extent that such rules permit a taking of Plaintiff Fazzino's property without compensation. Plaintiff Fazzino is entitled to injunctive relief preventing the Defendant District from enforcing its production limitation and spacing rules with respect to his property. Alternatively, Fazzino is entitled to injunctive relief prohibiting Defendant District from continuing to permit the City of Bryan to confiscate his private real property.

54. The District's application of its spacing rules to Plaintiff Fazzino's permit application effectively precludes Fazzino from availing himself of state administrative and judicial remedies against the taking of his property. As discussed above, the District advised Plaintiff Fazzino that his Amended Application "expired" due to his failure to provide information showing that he owned or controlled a sufficient acreage to meet the District's spacing requirements for the amount of production Fazzino requested. In response to a request for a variance from the spacing rules, the District explained that it did not provide variances or any type of exceptions to the acreage requirements of Rule 7.1. As long as Plaintiff Fazzino's permit application remains "administratively incomplete", he is effectively precluded from

obtaining a final determination by the board. Plaintiff Fazzino therefore cannot seek compensation for the taking, which here takes the form of a production permit that would allow Fazzino his right to offset drainage of his groundwater by production. Without a final determination by the board, and in the face of a statement that the District does not provide for variances from its rules, Plaintiff Fazzino is left with no available adequate remedy. Therefore, Plaintiff Fazzino's takings claim is ripe for adjudication before this Court. *See Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 385 (5th Cir. 2001)("for a federal takings claim to be come ripe, the plaintiff is required to seek compensation through the procedure the state has provided unless those procedures are unavailable or inadequate").

55. It is well settled law and all Defendants are objectively and actually aware that groundwater in Texas belongs to the landowner in place and cannot be taken for public use without adequate compensation. *See, EAA v. Day,* supra at 817. All Defendants are objectively and actually aware that the District is allowing some groundwater producers to produce disproportionate amounts of groundwater from small tracts of land. Transcript, Public Permit Hearing, May 9, 2013, pp. 40-42, 49, 51-52. And all Defendants are objectively and actually aware that in allowing disproportionate production from small tracts, the District is taking property rights from neighboring property owners. To quote Defendant Russ: "We understand the problem. . . . I mean, we know; every one of us know." Transcript, Public Permit Hearing, May 9, 2013, p. 54.

56. Plaintiff Fazzino therefore requests monetary damages in the amount of $100,000 from the Individual Defendants and prospective injunctive relief as to all Defendants. Plaintiff Fazzino further requests punitive damages against the Individual Defendants in an amount to be determined by the jury.

VII.
ATTORNEYS' FEES

57. Pursuant to 42 U.S.C.A. § 1988, Plaintiffs request the Court to award them a reasonable attorneys' fee as part of the costs.

VIII.
JURY DEMAND

58. Plaintiffs demand trial by jury.

IX.
PRAYER

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter an order enjoining Defendants from violating the constitutionally protected rights of Plaintiff Stratta
2. Enter an order awarding nominal and punitive damages to Plaintiff Stratta in an amount to be determined according to proof at trial;
3. Award compensatory damages to Plaintiff Fazzino in an amount to be determined according to proof at trial, together with pre-judgment and post-judgment as provided by law;
4. Award punitive damages to Plaintiff Fazzino in an amount to be determined according to proof at trial;
5. Enter an order enjoining the Defendants from enforcing the District's Rules in a manner that results in violations of Plaintiff Fazzino's private real property rights;
6. Enter an order awarding attorneys' fees against all Defendants pursuant to 42 U.S.C.A. § 1988; and
7. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Marvin W. Jones

Marvin W. Jones
Texas Bar No. 10929100
marty.jones@sprouselaw.com
C. Brantley Jones
Texas Bar No. 24079808
brantley.jones@sprouselaw.com
SPROUSE SHRADER SMITH PLLC
701 S. Taylor, Suite 500
Amarillo, Texas 79101
Main Telephone: 806-468-3300
Main Facsimile: 806-373-3454

ATTORNEYS FOR PLAINTIFFS