

NO. 17-02-20199-CV

ANTHONY FAZZINO	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	
	§	ROBERTSON COUNTY, TEXAS
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT	§	
	§	
Defendant.	§	<u>82nd</u> JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ANTHONY FAZZINO (hereinafter "Plaintiff") and files this, his Original Petition against the BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT (hereinafter "District"), and in support thereof would show as follows:

**I.**  
**PARTIES**

1. Plaintiff Anthony Fazzino is an individual who resides in Brazos County Texas.
2. Defendant Brazos Valley Groundwater Conservation District is a political subdivision of the state of Texas created by the Texas Legislature to operate under, and carry out the purposes of, Chapter 36 of the Texas Water Code. Defendant may be served with process in this action by service upon its general manager, Alan Day, at the offices of the District located at 112 W. 3rd Street, Hearne, Texas 77859.

**II.**  
**JURISDICTION AND VENUE**

3. This court has jurisdiction over this matter pursuant to Texas Water Code Section 36.251, under which the Legislature waives governmental immunity of the District for suits by persons affected by and dissatisfied with any order made by a groundwater conservation district.

4. Additionally, this court has jurisdiction of this matter under Article I, Section 17 of the Texas Constitution, which is a self-executing constitutional waiver of immunity from suit.

5. Venue is proper in Robertson County, Texas because the District is located in that county. Additionally, venue is proper in Robertson County, Texas because all or part of the cause of action asserted herein arose in Robertson County.

**III.**  
**BACKGROUND FACTS**

6. 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 from the 2.7 acre tract in close proximity to the property owned by Plaintiff. The District granted a permit for Well No. 18, which permit authorizes the City of Bryan to produce 4,838 acre-feet per year of groundwater at a rate of 3,000 gallons per minute.

7. Pursuant to rules promulgated by the District, wells producing groundwater from the Simsboro Formation are subject to production limits set forth in Rule 7.1(c), pursuant to a formula expressed in that Rule. Such formula includes as one component the required spacing of groundwater wells, as set forth in Rule 6.1. Under that rule, Well No. 18 is 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. The formula set forth in the District's Rule 7.1 sets a production limit 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. Given the 3,000 gallon per minute production rate of Well No. 18, the formula would require 648.76 contiguous acres surrounding Well No. 18, not a mere 2.7 acres. Put differently, if the District properly applied its rules to Well No. 18, given the 2.7 acre “footprint” surrounding the well, the City of Bryan could produce only 195 gallons per minute from Well No. 18, not 3,000 gallons per minute, and would be able to produce only 315 acre-feet per year, not 4,838.

8. Plaintiff owns 26.65 acres of real property located in Brazos County Texas. If the District rules are applied as written to Plaintiff’s property, Plaintiff would not be allowed to produce anywhere near the amount of groundwater that the District has allowed the City of Bryan to produce from Well No. 18. Because groundwater, like oil and gas, is fugacious, Well No. 18 is causing drainage of groundwater from Plaintiff’s property. The District’s rules, as applied to Plaintiff, prevent Plaintiff from being able to offset the drainage that is occurring as a result of the disparate production limits granted to the City of Bryan for Well No. 18.

#### **IV. CAUSE OF ACTION: TAKING**

9. As noted above, Plaintiff owns 26.65 acres of real property, and the associated groundwater rights, located in close proximity to the 2.7 acre tract from which the District allows production of 4,838 acre-feet per year. Plaintiff owns the groundwater rights under such property as his constitutionally protected private property. The Texas Supreme Court has long recognized the significant value of such groundwater rights and has enforced both statutory and constitutional protections of those rights. *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012); *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. filed); *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).

10. The Texas Legislature has similarly recognized the ownership of such groundwater rights. 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).

11. All groundwater rights owners are entitled 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 v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944); *Coyote Lake Ranch v. City of Lubbock*, \_\_\_S.W.3d \_\_\_, 59 Tex. Sup. J. 967, 2016 Tex. Lexis 415 (May 27, 2016)(applying oil and gas law to groundwater).

12. 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 5<sup>th</sup> Amendment to the United States Constitution and by Section 17 of Article I of the Texas Constitution. *Marrs* at 949.

13. The District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its tiny tract of land results in drainage of Plaintiff's 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 cannot offset that drainage. Therefore the District's regulatory scheme as applied to Plaintiff has resulted in a taking of Plaintiff's constitutionally protected property without compensation to Plaintiff, in direct violation of the United States and Texas Constitutions.

14. The District's Rule 8.7(6) and the permit at issue both provide that "[a] finding that false information has been supplied [as part of the permit application] is grounds for immediate revocation of the permit." The District has been notified that the permit issued for Well No. 18 was obtained as a result of false representations made by the City of Bryan on its application for such permit. *See* Complaint, attached as Exhibit 1. Nevertheless, the District has failed and refused to revoke the permit for Well No. 18, and has deliberately continued to allow that well to drain Plaintiff's property.

15. Plaintiff has been damaged by the taking of his real property in an amount that exceeds the jurisdictional minimum of this Court. Accordingly, Plaintiff is entitled to recover

damages in an amount that will compensate him for the value of the property taken or the diminished market value of his property as a whole.

16. Because the District has been put on notice that the permit for Well No. 18 was obtained by false representations, and because the District has failed and refused to act to revoke that permit, the District's conduct is intentional, and Plaintiff is entitled to recover punitive damages against the District in an amount that will punish such conduct and discourage similar conduct by the many similarly situated groundwater conservation districts that abuse their positions and authority to deprive property owners of their rights.

**V.  
REQUEST FOR DISCLOSURE**

17. Plaintiff requests that Defendant provide the information required under Tex. R. Civ. P. Rule 194 within 50 days of the service of this Original Petition.

**VI.  
PRAYER**

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Award compensatory damages to Plaintiffs in an amount to be determined according to proof at trial against the District;
2. Award punitive damages to Plaintiff in an amount that is sufficient to punish the District and deter others from committing similar violations;
3. 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  
SPOUSE SHRADER SMITH PLLC  
701 S. Taylor, Suite 500  
Amarillo, Texas 79101  
Main Telephone: 806-468-3300  
Main Facsimile: 806-373-3454

ATTORNEYS FOR PLAINTIFF





6. Additionally, the original issuance of BV-DO-0003 is replete with irregularities. Notice was not provided to adjoining property owners. The hydrologic study required by District Rules was not made at the time of permit issuance. The Board of Directors issued a conditional permit, requiring that it review and approve the hydrologic impact study prior to the permit becoming effective and authorizing production, but the General Manager (Bill Riley) issued the permit on his own, non-existent authority.
7. BVGRA requests that the District hold a hearing and allow it to introduce evidence to support a finding that false information was supplied as part of the Well No. 18 operating permit application and that following the hearing BV-DO-0003 be immediately revoked. Such a revocation would allow Bryan an opportunity to comply with all applicable District requirements, including obtaining water rights from adjacent landowners sufficient to support its desired level of production, before the permit could be reissued.
8. Alternatively, BVGRA and Fazzino request that the District initiate proceedings to involuntarily amend Bryan's Well No. 18 Permit, pursuant to District Rule 8.5(c), to limit production to an amount that does not drain neighboring properties and deprive owners of their fair share of groundwater from the Simsboro aquifer.

Respectfully Submitted,

BY:



Douglas G. Caroom  
State Bar No. 03832700  
[dcaroom@bickerstaff.com](mailto:dcaroom@bickerstaff.com)

BICKERSTAFF HEATH DELGADO ACOSTA LLP  
3711 S. MoPac Expressway  
Building One, Suite 300  
Austin, Texas 78746  
Telephone: (512) 472-8021  
Facsimile: (512) 320-5638

*Attorneys for Brazos Valley Groundwater Rights  
Association and Tony Fazzino*