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

AQUA TEXAS, INC., Plaintiff, vs. HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT, BRUCE MOULTON in his official capacity as Director of the Hays Trinity Groundwater Conservation District, DAVID SMITH in his official capacity as Director of the Hays Trinity Groundwater Conservation District, DOC JONES in his official capacity as Director of the Hays Trinity Groundwater Conservation District, CARLOS TORRES-VERDIN in his official capacity as Director of the Hays Trinity Groundwater Conservation District, Defendants, and TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION, Movant.	§	NO. 1:23-CV-1576-DAE

ORDER: (1) GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS; AND (2) GRANTING MOTION TO INTERVENE

Before the Court is: (1) Defendants Hays Trinity Groundwater Conservation District ("Hays Trinity" or "District"), Bruce Moulton in his official capacity as Director of Hays Trinity, David Smith in his official capacity as Director of Hays Trinity, Doc Jones in his official capacity as Director of Hays Trinity, and Carlos Torres-Verdin in his official capacity as Director of Hays Trinity's (the "Directors") (all collectively, "Defendants") Motion to Dismiss (Dkt. # 7); and (2) Movant Trinity Edwards Springs Protection Association's ("Trinity Edwards") Opposed Motion to Intervene (Dkt. # 23). The Court finds a hearing on these motions is not necessary. After careful consideration of the memoranda in support of and in opposition to the motions, the Court, for the reasons that follow, **GRANTS IN PART** and **DENIES IN PART** Defendants' motion to dismiss, and **GRANTS** Trinity Edwards's motion to intervene.

BACKGROUND

Aqua Texas is a Texas retail public utility regulated by the Texas Public Utilities Commission ("PUC") under Certificates of Convenience and Necessity ("CCN") No. 13254 for water and No. 21116 for wastewater. (Dkt. # 1 at 5.) Under Texas law, CCNs "give holders the exclusive right to provide water or sewer service within particular service areas." Green Valley Special Util. Dist. v. City of Cibolo, 866 F.3d 339, 340 (5th Cir. 2017) (citing Tex. Water Code § 13.242(a)). Aqua Texas was created by the Texas Legislature in 2001 with a

mission to conserve, recharge, and prevent waste of groundwater within western Hays County, Texas. See Tex. Spec. Dist. Loc. Laws Code § 8843.001 et seq. It provides water and wastewater service to almost 400 systems throughout Texas. (Dkt. # 1 at 5.) Specifically, Aqua Texas services retail customers in three relevant systems within the jurisdictional boundaries of Hays Trinity: (1) Woodcreek Phase I, (2) Woodcreek Phase II; and (3) Mountain Crest. (Id.) Aqua Texas alleges that its customers in these areas are mostly homes in residential subdivisions with ordinary water usage of Texas homeowners. (Id.)

Additionally, Aqua Texas contends that it owns and operates groundwater wells for the relevant utility systems in this case within the jurisdictional boundaries of Hays Trinity. (Dkt. # 1 at 5.) Aqua Texas alleges that its wells were drilled, completed, and operating prior to the Texas Legislature's creation of Hays Trinity in 2001. (Id.) Following the creation of the District, operating permits were issued to Aqua Texas, authorizing production of water from its wells. (Id. at 6.)

Aqua Texas alleges that on April 13, 2023, Hays Trinity sent Aqua Texas a Notice of Alleged Violation ("NOAV") for exceeding its operating permit production limit for the 2022 year. (Dkt. # 1 at 6.) According to Aqua Texas, the NOAV alleged that three operating wells were in violation of exceeding the annual drought-adjusted permitted amounts. (Id.) Based on the violation, Hays Trinity

assessed $448,710 in penalties against Aqua Texas, ordering payment by May 8, 2023, or just over three weeks after the NOAV was sent. (Id.)

Aqua Texas further alleges that twenty other NOAVs were also issued to other water providers in response to over-pumping during drought curtailment. (Dkt. # 1 at 6.) Thereafter, according to Aqua Texas, the District considered four settlements from the other water providers to whom the NOAVs were also sent, resulting in penalty payments being forgiven in exchange for the water providers' spending money on conservation efforts. (Id.) Aqua Texas contends that it requested the same penalty forgiveness that other water providers had received in light of its own dedication to conservation and replacement of aging infrastructure. (Id.) Aqua Texas asserts that it has spent millions of dollars to reduce water loss and proactively address conservation and line leakage during the drought curtailment period. (Id. at 7–8.) According to Aqua Texas, the amount it has spent on conservation efforts far exceeds the $448,710 penalty that the District assessed against it, citing examples of such efforts. (Id. at 8–10.)

Aqua Texas also contends that it provided receipts and documentation of its extensive conservation efforts to Hays Trinity, but that the District failed to follow its own precedent and denied Aqua Texas's request for penalty forgiveness without any explanation. (Dkt. # 1 at 10–11.) According to Aqua Texas, the parties were engaged in settlement discussions when Hays Trinity provided the

media with information concerning their settlement negotiations, violating the Rules of Evidence prohibiting this action. (Id. at 11.) Aqua Texas alleges that Hays Trinity provided a one-sided story to the media which disparaged Aqua Texas in the process. (Id.) Aqua Texas also maintains that Hays Trinity "has repeatedly shown animosity and bias against Aqua Texas by penalizing not only Aqua Texas, but its customers too." (Id.) Aqua Texas alleges Hays Trinity has threatened that it will not renew Aqua Texas's permits if it does not timely pay the penalty charge, resulting in danger to Aqua Texas's customers being deprived of water service. (Id.) Aqua Texas asserts that, "[w]ithout this Court's intervention, if [the District] is allowed to continue its unequal treatment and unlawful bias against Aqua Texas, the residents who are served by Aqua Texas will be left without water and no viable substitute for water service." (Id.)

On December 29, 2023, Aqua Texas filed suit in this Court against Hays Trinity, alleging: (1) claims pursuant to 42 U.S.C. § 1983 for violations of equal protection and procedural due process; (2) a takings claim; and (3) arguing that the District's penalty fee exceeds the statutory cap and that its permitting moratorium exceeds statutory authority. (Dkt. # 1.) On June 10, 2024, the District filed counterclaims against Aqua Texas seeking civil penalties and injunctive relief for failure to cap or plug abandoned and/or deteriorated well violations. (Dkt. # 15.)

On April 30, 2024, the District filed a motion to dismiss Aqua Texas's claims. (Dkt. # 7.) On May 28, 2024, Aqua Texas filed a response in opposition. (Dkt. # 12.) The District did not file a reply. On August 1, 2024, Trinity Edwards filed an opposed motion to intervene in the case. (Dkt. # 23.) On August 8, 2024, Aqua Texas filed a response in opposition. (Dkt. # 25.) On August 15, 2024, Trinity Edwards filed a reply. (Dkt. # 27.)

I. Motion to Dismiss

The District moves to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. # 7.)

A. Legal Standard

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). In analyzing a motion to dismiss for failure to state a claim, "[t]he court accept[s] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

B. Discussion

The District first moves to dismiss on the basis that Aqua Texas's claims against the Directors of Hays Trinity are duplicative of its claims against the District. (Dkt. # 7 at 7.) The District also asserts that its directors are entitled to qualified immunity and that it bars Aqua Texas's takings claim. (Id. at 9–10.) The District also maintains that Aqua Texas fails to state an equal protection claim, and that the District's rules in this case cannot form the basis of a due process claim. (Id. at 11–12.)

1. Directors' Official Capacity Claims

The District argues that since Aqua Texas has sued both the District and its Directors in their official capacities, the claims against the Directors should be dismissed because they are duplicative of the claims against the District. (Dkt. # 7 at 8.) The District argues that it is well established that a suit against a

governmental official in his or her official capacity should be treated as a suit against the governmental entity. (Id.)

In response, Aqua Texas argues that it seeks only monetary damages against the District, and not the Directors; instead, Aqua Texas contends that it seeks only injunctive relief against the Directors in their official capacities in order to enjoin the Directors' enforcement of their "illegal permitting moratorium, and to enjoin their enforcement of a penalty against Aqua Texas for any year in which the same type of penalty was forgiven with respect to all other similarly-situated persons." (Dkt. # 12 at 15–16.) Thus, Aqua Texas argues their claims against the Directors in their official capacities are appropriate. (Id.)

"[A] suit against a governmental officer 'in his official capacity' is the same as a suit 'against [the] entity of which [the] officer is an agent[.]'" McMillian v. Monroe Cnty., Ala., 520 U.S. 781, 785 n.2 (1997) (quoting Kentucky v. Graham, 473 U.S. 159, 165 (1985)). In this case, "[t]he official-capacity claims and the claims against the governmental entity essentially merge." Turner v. Houma Mun. Fire and Police Civ. Serv. Bd., 229 F.3d 478, 485 (5th Cir. 2000). "If the claims against an official in his official capacity seek identical relief as claims against a governmental entity, the official capacity claims may be dismissed as duplicative." Notariano v. Tangipahoa Par. Sch. Bd., 266 F. Supp. 3d 919, 928

(E.D. La. 2017) (citing Castro Romero v. Becken, 256 F.3d 349, 355 (5th Cir. 2001)).

Aqua Texas appears to seek identical relief from the Directors, all named only in their official capacities, as from the District. From all Defendants, Aqua Texas seeks damages for violations of § 1983, so all claims for damages are duplicative. (See Dkt. # 1 at 21.) Although Aqua Texas argues that the relief sought against the Directors is different because it seeks "injunctive relief to enjoin" their enforcement of illegal permitting and penalties, equitable relief is available against the District and the Directors under § 1983. See Broyles v. Texas, 618 F. Supp. 2d 661, 682 (S.D. Tex. 2009) ("Damages and injunctive relief are available against municipalities and municipal officials in their official capacities."), aff'd, 381 F. App'x 370 (5th Cir. 2010) (unpublished). Because Aqua Texas seeks the same relief against the Directors as from Hays Trinity, the claims are duplicative and merge with each other. And, because they are only sued in their official capacities, the Court will dismiss without prejudice all claims against the Directors.[1] See Castro Romero, 256 F.3d at 355 (affirming dismissal of duplicative official capacity claim).

[1] Given this decision, the Court declines to consider the District's additional argument that qualified immunity bars the claims against the Directors.

2. Equal Protection

Defendants contend there is no right to settlement created by any of the District's rules or policies concerning settlement of an NOAV, and therefore any claim for violation of that purported right is subject to dismissal.[2] (Dkt. # 7 at 11–12.) In response, Aqua Texas asserts that it has properly pleaded that the District's discriminatory application of its penalty policy violates Aqua Texas's right to equal protection. (Id. at 7.) Aqua Texas argues that its claim is not based on a right to settlement, and but instead is based on the District's establishment of a policy and practice of granting complete penalty forgiveness to similarly situated water utilities based on money spent for conservation efforts, all while refusing to forgive Aqua Texas's penalties despite its own documented money spent for conservation efforts. (Id. at 8.)

Aqua Texas has alleged a class-of-one equal protection claim. (Id.) In order to state a claim under § 1983, a plaintiff is required to "allege a violation of a right secured by the Constitution or laws of the United States." Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir. 2000)). "The Equal Protection Clause protects individuals from governmental action that works to treat similarly

[2] Defendants cite the amendment to the District's Rule 10.1.2.1, which purports to provide guidance on settlement of NOAVs. (Dkt. # 7 at 11–12.) However, this rule was amended in November 2023, after the events giving rise to this lawsuit. Aqua Texas does not in any case rely on this Rule to support its equal protection claim. (See Dkt. # 12 at 7–8.)

situated individuals differently." John Corp. v. City of Hous., 214 F.3d 573, 577 (5th Cir. 2000). An equal protection claim based on unique treatment instead of a suspect classification is called a class-of-one claim. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

A class-of-one equal protection claim requires a plaintiff to allege that it has been (1) intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment. Id. Where the plaintiff "generally alleges that other similarly situated individuals were treated differently, but he points to no specific person or persons and provides no specifics as to their violations," the complaint does not meet the pleading standard required under rule 12(b)(6). Rountree v. Dyson, 892 F.3d 681, 685 (5th Cir. 2018). "An allegation that others are treated differently, without more, is merely a legal conclusion that [a court is] not required to credit." Id.

Aqua Texas's complaint alleges that four other water service providers, Cedar Oaks Mesa Water Supply Corporation, Ciel Azul Ranch, Danforth Jr. High, and Wimberly Water Supply Corporation ("Wimberly WSC"), all asked for forgiveness of their assessed penalties pursuant to the NOAV they received. (Dkt. # 1 at 6.) According to the complaint, Wimberly WSC was assessed $140,620 in penalties and the Hays Trinity Board recommended complete forgiveness of the penalty in exchange for Wimberly WSC's spending $90,000 on

conservation efforts and loss. (Id. at 7.) Aqua Texas states that the Board determined it would forgive the penalty for any assessment where the water service provider spends money fixing line leaks or conservation efforts instead of going to the District as penalties. (Id.) Aqua Texas further alleges that the action the District took regarding Wimberly WSC "set a precedent and policy for how the Board would handle penalty forgiveness." (Id.)

Aqua Texas alleges that, "with knowledge of the Board policy and precedent, [it] requested the same penalty forgiveness that was afforded Wimberly WSC and others whose penalty amounts were completely forgiven." (Dkt. # 1 at 7.) Aqua Texas asserts that under the District's policy, it was entitled to the same penalty forgiveness based on the amounts and time it has spent and will continue to spend on conservation efforts. (Id.) Aqua Texas contends that it provided receipts and documentation of the money it spent to Hays Trinity, but the District nonetheless refused to follow its own precedent and inexplicably denied Aqua Texas's request for penalty forgiveness. (Id. at 10–11.) Aqua Texas alleges that "there is no rational basis for Defendants' differential treatment of Aqua Texas, but there is cause to believe that the difference is intentional and is also the result of the Directors' personal animus towards Aqua Texas." (Id. at 11.)

The Court finds that at this stage of the proceedings, Aqua Texas has sufficiently alleged a class-of-one equal protection claim against Hays Trinity.

Aqua Texas has alleged that it was intentionally treated differently from others similarly situated, specifically Wimberly WSC, and that there is no rational basis for the difference in treatment. The Court will deny Defendants' motion to dismiss this claim.

3. Due Process

Defendants next contend that the District's rules are not an unauthorized exercise of the District's powers and cannot form the basis of a due process claim or state law claim. (Dkt. # 7 at 12.) Specifically, Defendants assert that the District may limit consideration of operation permit applications during drought and that it has enforcement powers. (Id. at 12–15.) Defendants contend that procedural due process is satisfied when a legislative body performs its responsibilities in the normal manner proscribed by law. (Id. at 12.)

In response, Aqua Texas argues that it has adequately pleaded that Defendants have violated Aqua Texas's due process, and that the District's moratorium and penalty fees violate the authority granted to the District under its enabling statute and the Texas Water Code. (Dkt. # 12 at 9.) Aqua Texas further contends that it has alleged both substantive and procedural due process claims regarding its allegations that the District's enactment of a permit moratorium is devoid of legal authorization. (Id. at 10.) Additionally, Aqua Texas argues that it

has adequately pleaded the District's penalty assessment violates the Texas Water Code. (Id. at 11.)

a. Permit Moratorium

Aqua Texas's complaint alleges that the District has imposed a moratorium on permitting new wells, which prevents Aqua Texas from making use of its groundwater under the property it owns, and after Aqua Texas drilled two new wells at substantial expense. (Dkt. # 1 at 13.) Aqua Texas contends the District knew about the new wells, and that Chapter 36 of the Texas Water Code does not authorize the District to impose a moratorium on permitting new wells, nor does the District's enabling legislation. (Id.) Aqua Texas asserts that the District's actions violates both procedural and substantive due process. (Id. at 13–14.)

i. Substantive Due Process

To prevail on a substantive due process claim, a plaintiff must establish that he or she holds a constitutionally protected property right to which due process protections apply. Simi Inv. Co. v. Harris Cty., Tex., 236 F.3d 240, 249 (5th Cir. 2000). "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to

those benefits." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). "If there is no protected property interest, there is no process due." Spuler v. Pickar, 958 F.2d 103, 106 (5th Cir. 1992).

Additionally, even where state law creates an underlying substantive interest, "federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (internal quotation omitted). If a plaintiff shows that is has been deprived of a property interest, it must further show that the deprivation was not "rationally related to a legitimate government interest." Simi, 236 F.3d at 249.

Here, where the property interest is a permit, it is usually only recognized as a deprived property interest if a permit or license that has been issued is taken away without due process. Bowlby v. City of Aberdeen, 681 F.3d 215, 220 (5th Cir. 2012). Based on the facts provided in Aqua Texas's complaint, the Court will interpret the issue here as whether Aqua Texas has a property interest in obtaining a permit on its two new wells. (Dkt. # 1 at 12–13.) Aqua Texas has alleged that the District has declined to grant permits to Aqua Texas for its new wells and instead imposed a permitting moratorium after Aqua Texas notified the District of its intent to drill the new wells. Importantly, Aqua Texas has not alleged that Hays Trinity has suspended or rescinded any permit that was

previously issued or that has already been acquired by Aqua Texas. (Id.) Given this, the Court finds that Aqua Texas has failed to adequately allege a protected property right to sustain its claim. See DM Arbor Court, Ltd. v. City of Hous., H-18-1884, 2021 WL 4926015, at *26 (S.D. Tex. Oct. 21, 2021) ("[Permits] cannot create a property interest prior to issuance." (citing Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005))).

Even if Aqua Texas could adequately allege a protected property interest, the District has asserted a rational basis for its actions. The District's response indicates that it has a legitimate state interest in the conservation of the aquifer, and it has not denied Aqua Texas of all of its economically viable use of its own property. (Dkt. # 7 at 13.) The District asserts that it has not acted outside of its enabling legislation which states that:

> During Stage 3 (Critical) or Stage 4 (Emergency) conditions, the District will not accept any application for a new operating permit or any amendment to increase production under an existing operating permit.

(Id. at 13 (citing District Rule 13.3.3(B)). Thus, the District contends that its Rule is a reasonable limitation adopted to sustain the aquifer and for the benefit of the public. (Id.) Given this, "unless a decision to revoke (or deny) a permit is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' it will escape stiffer scrutiny from the federal courts." DM Arbor, 2021 WL 4926015, at *26 (citing Shelton v. City of Coll.

Station, 780 F.2d 475, 480 (5th Cir. 1986)). Indeed, Aqua Texas's own allegations in this respect demonstrate that the area was suffering from drought at the time the NOAVs were issued to the water providers. Therefore, the Court finds that the District had a reasonable basis to withhold the permits for Aqua Texas's new wells. The Court will thus grant Defendants' motion to dismiss Aqua Texas's substantive due process claim.

ii. Procedural Due Process

Aqua Texas's procedural due process claim arises from the same set of facts as its substantive due process claim. Procedural due process under the Fourteenth Amendment of the United States Constitution is implicated where an individual is deprived of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV, § 1, cl. 3. Claims under procedural and substantive due process both require the plaintiff to identify a protected property interest. Meza v. Livingston, 607 F.3d 392, 399 (5th Cir. 2010). Whereas substantive due process protects plaintiffs from the arbitrary deprivation of property interests, see Cnty. Of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998), procedural due process guarantees "an opportunity to be heard" before the deprivation. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A procedural due process analysis requires courts to first consider "the private interest that will be affected by the official action." Id. Second, courts must look at "the risk of an erroneous deprivation of such interest through the procedures used and [the] probable value, if any, of additional procedural safeguards;" and third, "the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail." Id. at 321.

The Court has already considered whether Aqua Texas had a property interest in the un-issued permits to its two new wells. The "protection of property is a safeguard of the security of interests *that a person has already acquired* in specific benefits." Roth, 408 U.S. at 576 (emphasis added). "Privileges, licenses, certificates, and franchises . . . qualify as property interests for purposes of procedural due process." Wells Fargo Armored Serv. Corp. v. Ga. Pub. Serv. Comm'n, 547 F.2d 938, 941 (5th Cir. 1977). "This is because, once issued, a license or permit 'may become essential in the pursuit of a livelihood.'" Bowlby v. City of Aberdeen, 681 F.3d 215, 220 (5th Cir. 2012) (quoting Bell v. Burson, 402 U.S. 535, 539 (1971)). Here, however, the permits were never issued to Aqua Texas.

And, even if Aqua Texas had adequately alleged a protected property interest, it has failed to alleged facts to show that the District deprived it of any

interest. Aqua Texas does not allege that the District failed to follow its normal legislative process in adopting District Rule 13.3.3(B), cited above, nor that it acted arbitrarily or capriciously in doing so. Nor has Aqua Texas alleged that it is being deprived of any "interests that [it] has already acquired." See Roth, 408 U.S. at 576.

Courts must also consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 424 U.S. at 335. The District, has discussed previously, has asserted a clear interest in conserving and sustaining resources to the aquifer in times of drought. Accordingly, given the above, the Court finds that Aqua Texas has failed to sufficiently allege that it was denied procedural due process and this claim will be dismissed.

b. Penalty Assessment

Aqua Texas's complaint also alleges that the District's penalty fee that was assessed against it—and the District's failure to forgive the penalty—are actions that exceed the District's authority. (Dkt # 1 at 16.) According to Aqua Texas, the penalty fee the District imposes on groundwater production is not authorized by statute. (Id. at 17.) Defendants move to dismiss this claim on the basis that Aqua Texas has failed to establish articulable facts that the action was an unreasonable exercise of the District's governmental authority. (Dkt. # 7 at 14.)

Defendants assert that the Texas Water Code ("Water Code") grants the District the authority to make and enforce rules such as the penalty assessment in this case. (Id. at 14–15.) In response, Aqua Texas contends that it has adequately pleaded that the District's assessment violates Texas statute. (Dkt. # 12 at 11.)

Aqua Texas's complaint alleges that the District's penalty schedule, adopted July 1, 2022, which states that "[e]xceeding production limit of an operating permit" may result in a fee of "up to $500.00 plus $5.00 per 1,000 gallons in excess of the total approved annual amount permitted" is not authorized by statute. (Dkt. # 1 at 16–17.) Aqua Texas complains the penalty fee schedule violates the following statutes: (1) sections 8843.151–.152 of the Texas Special District Local Laws Code; (2) section 36.205(c)(2)[3] of the Water Code; and (3) section 36.102 of the Water Code. (Id. at 16–18.)

Despite Aqua Texas's arguments to the contrary, the District is subject to Chapter 36 the Water Code which authorizes the District to, among others, develop a comprehensive management plan for aquifers within its jurisdiction and to adopt and enforce its rules. Tex. Water Code §§ 36.101, 36.102, 36.1071. Under the authority granted in Chapter 36 of the Water Code, groundwater conservation districts have broad authority to fulfill their purposes

[3] Aqua Texas incorrectly cites the statute as section 36.20*4*(c)(2) of the TWC. (See Dkt. # 1 at 17.)

through rulemaking. Guitar Holding Co. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 912 (Tex. 2008); Tex. Water Code Ann. § 36.0015 (groundwater conservation districts' rules are "the state's preferred method of groundwater management"). Section 36.102 grants conservation districts the authority to enforce their rules "by injunction, mandatory injunction, or other appropriate remedy in a court of competent jurisdiction." Tex. Water Code Ann. § 36.102(a). Additionally, conservation districts have the authority to "set reasonable civil penalties against any person for breach of any rule of the district not to exceed $10,000 per day per violation, and each day of a continuing violation constitutes a separate violation. Id. § 36.102(b).

The statutes cited by Aqua Texas do not supersede § 36.102 of the Water Code used to assess the penalty in this case—the sections cited in the Texas Special District Local Laws Code, sections 8843.151–.153, apply to fees to construct new wells, permit renewals, connection fees, and taxes. Aqua Texas has not sufficiently pleaded that the Special District Code takes precedence over the Water Code. Additionally, Aqua Texas's citation to § 36.205(c)(2) applies to the maximum amount a district may charge for groundwater production as opposed to the maximum penalty to be charged for violating a district rule. Nor does Aqua Texas's complaint sufficiently allege the penalty assessment was unreasonable or that it fails to serve any legitimate purpose. Accordingly, the Court will dismiss

Aqua Texas's claim based on a theory that the District's penalty fee exceeds the statutory cap.

4. Takings Claim

Regarding its takings claim, Aqua Texas alleges that it owns 18 acres of real property in Hays County, Texas. (Dkt. # 1 at 14.) Pursuant to that ownership, it contends that it owns the groundwater beneath the property and that it is entitled to drill for and produce the groundwater for beneficial use. (Id.) Aqua Texas further alleges that its vested ownership rights in the groundwater are protected under the United States and Texas Constitutions from being taken without payment of just compensation. (Id. at 15.) To support its claim, Aqua Texas asserts that the District's permitting moratorium on new wells prevents Aqua Texas from using its private property for its intended purpose and therefore constitutes a taking of its private property without compensation. (Id. at 16.)

Defendants move for dismissal on the basis that Aqua Texas has no cognizable takings claim. (Dkt. # 7 at 16.) Defendants argue that Aqua Texas's complaint fails to allege that it suffered any permanent physical taking of its property nor that the property has been deprived of all economically beneficial use. (Id. at 18.) Defendants further assert that Aqua Texas has not alleged any change to the property's value or any interference with its investment-backed expectations. (Id.)

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The "paradigmatic taking" involves the "direct government appropriation or physical invasion of private property." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005). However, a taking can occur even in the absence of such a direct appropriation. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Although a taking occurs when regulation goes "too far," the Supreme Court "has generally eschewed any set formula for determining how far is too far, choosing instead to engage in essentially ad hoc, factual inquiries." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Pan. Agency, 535 U.S. 302, 336 (2002) (cleaned up). Significantly, however, this inquiry "aim[s] to identify regulatory actions that are functionally equivalent to . . . classic takings." Lingle, 544 U.S. at 539.

The Supreme Court has identified three categories of takings. First, and not relevant here, is a direct physical taking, which occurs when the government "requires an owner to suffer a permanent physical invasion of her property." Lingle, 544 U.S. at 538. It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of" a regulatory taking claim. Tahoe, 535 U.S. at 324.

Second, "regulations that completely deprive an owner of all economically beneficial use of her property" likewise constitute a "categorical" taking, except where principles of nuisance and property law "independently restrict" the owner's use. Lingle, 544 U.S. at 538 (cleaned up). This category "[i]s limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted.'" Tahoe, 535 U.S. at 330 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992)).

Third, government action may constitute a taking even if there is neither a physical taking or the complete elimination of all economically beneficial use. This category "is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." Id. at 322 (cleaned up). Although there is no "set formula" for this third category of taking, courts apply the three factors outlined in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Those factors examine: (1) "[t]he economic impact of the regulation"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." Id. at 124. Importantly, even under the Penn Central framework, "regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking." Horne v. Dep't of Agric., 576 U.S. 350, 364 (2015).

These three inquiries "share a common touchstone" in that they each "aim[] to identify regulatory actions that are functionally equivalent to the classic taking" and, thus, "each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." Lingle, 544 U.S. at 539. If the burden is too severe, a taking has occurred. At the same time, however, the Supreme Court has cautioned against defining takings too broadly: "Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford." Tahoe, 535 U.S. at 324, 122 S.Ct. 1465. Thus, "[a] central dynamic of" how the Supreme Court has approached regulatory takings is "flexibility." Murr v. Wisconsin, 582 U.S. 383, 394 (2017). Flexibility is the "means to reconcile two competing objectives": (1) "the individual's right to retain the interests and exercise the freedoms at the core of private property ownership"; and (2) "the government's well-established power to adjust rights for the public good." Id. (cleaned up).

Importantly, when a plaintiff suffers loss after a government action, that alone does not create a taking. Rather, "[t]he plaintiff bears the burden of proving that the government's actions were the direct and proximate cause of the [loss]." Cox v. Tennessee Valley Auth., 989 F.2d 499 (6th Cir. 1993); accord

Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 984 (9th Cir. 2002) ("[U]nder both federal and state law a plaintiff must make a showing of causation between the government action and the alleged deprivation."); Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1343 (Fed. Cir. 2018). In the context of permitting, "because it is the permit denial that can effect a regulatory taking, this court must examine the effect of that denial on plaintiffs' property interests." Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 484 (2009).

Aqua Texas's complaint does not allege a permanent physical taking nor that its property has been deprived of all economically beneficial use. (See Dkt. # 1 at 14–16.) Therefore, because this case concerns the third category of takings, regulatory takings, the Court will examine whether Aqua Texas has adequately pled the three Penn Central factors.

a. Economic Impact

To assess a regulation's economic impact, courts in the Fifth Circuit "compare the value that has been taken from the property with the value that remains in the property." Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 850 (5th Cir. 2016). The Supreme Court has long held "mere diminution in the value of the property, however serious, is insufficient to demonstrate a taking." Concrete Pipe and Prods. of Cal. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993). Regarding this factor, Aqua

Texas alleges that it spent $2 million for the purchase of the land and an additional $220,968 for drilling and testing the two new wells on its 18-acre property. (Dkt. # 1 at 8.) Because of the permitting moratorium, Aqua Texas states that it has "suffered damages," although it is not specific in the amount. (Id. at 16.) The Fifth Circuit has recognized that the denial of permits can "undoubtedly" reduce the value of a property. Da Vinci Inv., Ltd. P'ship v. City of Arlington, Tex., 747 F. App'x 223, 228 (5th Cir. Aug. 27, 2018). At this stage of the proceedings, the Court will find that Aqua Texas has sufficiently pled that it suffered an economic impact to meet the first Penn Central factor.

b. Investment Backed Expectations

"The second Penn Central factor—the interference with investment-backed expectations—is somewhat difficult to apply to groundwater regulation under the [Act]." Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 840 (Tex. 2012). The existing and permitted uses of the property constitute the "primary expectation" of the landowner that is affected by the regulation. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 936 (Tex. 1998); see also Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991), cert. denied, 505 U.S. 1219 (1992) ("Courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'"). "Historical uses of the property are critically

important when determining the reasonable investment-backed expectation of the landowner." Mayhew, 964 S.W.2d at 937. Existing property regulations at the time property is purchased should be considered in determining whether the regulation interferes with investment-backed expectations. Id. at 938. Knowledge of existing regulations "is to be considered in determining whether the regulation interferes with investment-backed expectations." Id. at 936.

Additionally, "what is 'relevant and important in judging reasonable expectations' is 'the regulatory environment at the time of the acquisition of the property.'" Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1345 (Fed. Cir. 2018) (quoting Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1350 n.23 (Fed. Cir. 2001) (en banc)). The Supreme Court has found it "quite simply untenable" that parties "could establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." Penn Cent., 438 U.S. at 130.

Here, there is no dispute that Aqua Texas bought the property and drilled the wells with the intention of pumping its groundwater for public use, investing time, money and effort in doing so. There is also no dispute that it bought the property within the bounds of the District, and that Aqua Texas had an expectation that it would be able to pump groundwater within reasonable limits. In

fact, Aqua Texas acknowledges that the Water Code gives conservation districts some "measured authority to limit the amount of groundwater a landowner may produce," but argues that it also "flatly prohibits a district from denying a landowner all access to its groundwater." (Dkt. # 12 at 13 (citing Tex. Water Code § 36.002(c)).) Still, Aqua Texas has alleged that the District instituted the permit moratorium after it had purchased the land, and drill tested its new wells. (Dkt. # 1 at 16.) "The regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of" a claimant's investment-backed expectations. Palazzolo v. Rhode Island, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring).

The Court finds that, at this stage of the proceedings, Aqua Texas has sufficiently alleged the second Penn Central factor—that the permit moratorium interfered with its investment-backed expectations.

c. Nature of Regulation

"The third Penn Central factor focuses on the nature of the regulation and is not as factually dependent as the other two." Day, 369 S.W.3d at 840. "Unquestionably, the State is empowered to regulate groundwater production." Id. "In many areas of the state, and certainly in the Edwards Aquifer, demand exceeds supply. Regulation is essential to its conservation and use." Id. As mentioned, Defendants contend the permit moratorium aims to conserve and sustain resources

to the aquifer in times of drought. Nevertheless, "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'" Penn Central, 438 U.S. at 128. Although this factor is likely to weigh in favor of the District at a later stage of this case, the Court finds the third Penn Central factor is properly alleged as Aqua Texas has asserted that the moratorium prevents it from using its private property for its intended purpose. (See Dkt. # 1 at 16.)

Upon consideration, at this stage of the proceedings, the Court finds that Aqua Texas has alleged a regulatory takings claim to survive dismissal. The Court will thus deny Defendants' motion to dismiss this claim.

C. Conclusion

Based on the foregoing, the Court will **GRANT IN PART** and **DENY IN PART** Defendants' Motion to Dismiss (Dkt. # 7). The motion is **GRANTED** as to: (1) the claims against the Directors of the District, and (2) Aqua Texas's claims for substantive and procedural due process, as well as any claims that the penalty assessment exceeds the District's authority. These claims are all **DISMISSED WITHOUT PREJUDICE**. The motion is **DENIED** as to Aqua Texas's remaining claims for equal protection and regulatory taking.

II. Motion to Intervene

Trinity Springs, "a group of citizens largely residing around Wimberly, Hays County, Texas, moves to intervene to protect their water resources, which are private property." (Dkt. # 23 at 1.) Trinity Springs argues that should Aqua Texas "wipe[] out the regulatory framework that protects groundwater, the potential impact of its over-pumping poses the risk of, at a minimum, the loss of groundwater, which is private property under Texas law, and at worst outright failure of home water wells going dry, as well as Cypress Creek, which is an economic artery flowing through the Wimberly area which feeds economic activity in the area." (Id. at 3.)

Aqua Springs contends that it should be allowed to intervene in order to protect its privately held interests threatened by Aqua Texas, which is related to, but separate from the interests of the District in this case. (Id. at 2.) Trinity Springs asserts that if allowed to intervene, it will not seek any damages for its members, only a declaratory judgment that the District remains empowered to protect the water resources it oversees, and to protect the water rights on which many people depend, especially during extreme weather. (Id.)

Aqua Texas opposes the intervention on the basis that the "case is about a rogue groundwater district that has blatantly discriminated against Aqua Texas" and "[n]ow, the very environmental group that the district has been

colluding with in its vendetta against Aqua Texas seeks to join this lawsuit in support of the district and its board members." (Dkt. # 25 at 1.) Defendants do not oppose the motion to intervene.

Trinity Springs seeks to intervene as of right and permissive intervention. (Dkt. # 23 at 12.) Federal Rule of Civil Procedure 24(a)(2), which governs intervention as of right, provides:

> On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Based on this Rule, the Fifth Circuit has developed the following four-factor test in evaluating a motion to intervene under Rule 24(a)(2): "(1) the applicant must file a timely application; (2) the applicant must claim an interest in the subject matter of the action; (3) the applicant must show that disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties to the litigation. Heaton v. Monogram Credit Card Bank of Georgia, 297 F.3d 416, 422 (5th Cir. 2002). Generally, "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained." Id.

1. Timeliness

As an initial matter, the Court concludes that Trinity Springs's motion to intervene is timely, in light of all the factors outlined in Stallworth v. Monsanto Co., 558 F.2d 257, 263 (5th Cir. 1977).[4] Trinity Springs sought intervention once it learned of its interests and after it determined that mediation between the parties would not result in settlement and after Defendants filed their answer. There does not appear to be any real prejudice since the case is still in an early phase, nor does it appear that the District's interests are the same as Trinity Springs.

2. Interest

The second factor under Rule 24(a)(2) requires that the movant "claim an interest in the subject matter of the action." Heaton, 297 F.3d at 422. To support intervention as of right, a movant must show that it has "a direct, substantial, legally protectable interest in the action, meaning that the interest be one which the substantive law recognizes as belonging to or being owned by the

[4] The Stallworth factors are: (1) "[t]he length of time during which the would-be intervenor actually know[s] or reasonably should have known of his interest in the case before he petitioned for leave to intervene," (2) "[t]he extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case," (3) "[t]he extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied," and (4) "[t]he existence of unusual circumstances militating either for or against a determination that the application is timely." Stallworth, 558 F.2d at 264–66.

applicant." In re Lease Oil Antitrust Litig., 570 F.3d 244, 250 (5th Cir. 2009) (internal citations and quotation marks omitted). "[I]t is plain that something more than an economic interest is necessary." New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984). The "'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994).

Upon consideration, the Court concludes that Trinity Springs's members have a legally protectable interest in this litigation. Its members include persons with economic interests in businesses that depend on the outflow of Jacob's Well to create flows in Cypress Creek, along which many businesses are located. (Dkt. # 23 at 14.) In light of the significant impact this lawsuit may have upon Trinity Springs's member companies' operation, the Court concludes that Trinity Springs has sufficient interest in the subject matter of this litigation. See Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (ruling that forest products industry representatives could intervene in environmental lawsuit against the U.S. Forest Service, as they had a "legally protectable property interests in existing timber contracts that are threatened by the potential bar on even-aged [logging] management.").

3. Impairment

The third factor for intervention under Rule 24(a)(2) requires that the movant "show that disposition of the action may impair or impede the applicant's ability to protect [its] interest" in the subject matter of the litigation. Heaton, 297 F.3d at 422. Rule 24(a)(2) does not require "a showing by the applicant for intervention that he will be bound by the disposition of the action. The current practical impairment standard represents a liberalization of the prerequisites to intervention. . . . [T]his more generous measure of impairment favors would-be intervenors." Edwards v. City of Houston, 78 F.3d 983, 1004–05 (5th Cir. 1996) (internal citations omitted).

As discussed above, Trinity Springs contends that disposition of this action may impair or impede its members' water rights. Aqua Texas seeks relief that could considerably alter water rights in Texas and would impact a basic resource upon which Trinity Springs members and others rely for their central operations. The third factor is thus satisfied.

4. Adequate Representation

The final factor under Rule 24(a)(2) is that the movant's "interest must not be adequately represented by existing parties to the litigation." Heaton, 297 F.3d at 422. The showing for this final factor is "treated as minimal." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972).

"The burden of establishing inadequate representation is on the applicant for intervention." Edwards, 78 F.3d at 1005.

Aqua Texas contends that Trinity Springs's interests "are not inadequately represented by the District." (Dkt. # 25 at 3.) Aqua Texas argues that Trinity Springs's ultimate objectives are identical to the District's—curtail Aqua Texas's groundwater use. (Id.) Aqua Texas asserts that Trinity Springs fails to provide a single issue on which it diverges from the District, and in fact Aqua Texas argues that discovery in this case has revealed that Trinity Springs has a "joint defense agreement" with the District in light of their "common legal interests." (Id. at 4.)

Aqua Texas plainly does not represent Trinity Springs's interests in this case. Whether the District can adequately represent Trinity Springs's interests, however, requires a closer inquiry. The Fifth Circuit has repeatedly held that governmental defendants cannot adequately represent the interests of private parties (and vice versa), as the interests of governmental and private entities often diverge. See, e.g., Espy, 18 F.3d at 1207; Sierra Club v. City of San Antonio, 115 F.3d 311 (5th Cir. 1997); Sierra Club v. Glickman, 82 F.3d 106, 110 (5th Cir. 1996). The Court agrees here. Trinity Springs's members—which include landowners, business leaders and developers, among others—cannot be adequately represented by the District whose ultimate interests as a water conservation district

vary significantly from that of consumers and industrial water users. Such interests are different than that of end-users, whether private or commercial, who must focus on ensuring that they continue to receive their allocated water rights without the possible alterations that Aqua Texas seeks to secure. Thus, this last factor is also met.

5. Balancing of Factors

In light of the foregoing, the Court concludes that the factors under Rule 24(a)(2) favor granting Trinity Springs's motion to intervene. The Court concludes that Trinity Springs shall be permitted to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), and therefore **GRANTS** its motion to intervene.[5] (Dkt. # 23.)

CONCLUSION

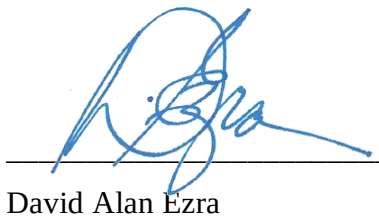
Based on the foregoing, the Court will **GRANT IN PART** and **DENY IN PART** Defendants' Motion to Dismiss (Dkt. # 7). The motion is **GRANTED** as to: (1) the claims against the Directors of the District, and (2) Aqua Texas's claims for substantive and procedural due process, as well as any claims that the penalty assessment exceeds the District's authority. These claims are all **DISMISSED WITHOUT PREJUDICE**. The motion is **DENIED** as to Aqua

[5] The Court therefore need not analyze the permissive intervention factors.

Texas's claims for equal protection and regulatory taking. The Court will further **GRANT** Trinity Springs's Opposed Motion to Intervene (Dkt. # 23).

IT IS SO ORDERED.

DATED: Austin, Texas, September 23, 2024.



David Alan Ezra
Senior United States District Judge