

CAUSE NO. 17-02-20199-CV

ANTHONY FAZZINO

Plaintiff,

v.

BRAZOS VALLEY GROUNDWATER
CONSERVATION DISTRICT,

Defendant.

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IN THE DISTRICT COURT

82nd JUDICIAL DISTRICT

ROBERTSON COUNTY, TEXAS

**SECOND AMENDED PLEA TO THE JURISDICTION AND
ORIGINAL ANSWER OF DEFENDANT
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT**

TO THE HONORABLE JUDGE OF SAID COURT:

The Brazos Valley Groundwater Conservation District (the “District”) files this Second Amended Plea to the Jurisdiction and Original Answer, and in support thereof, shows as follows:

I. NATURE OF THE CASE AND PROCEDURAL BACKGROUND

1. This lawsuit involves groundwater rights in the Simsboro aquifer, the District’s groundwater permitting program, and one landowner’s complaint about groundwater pumping by his neighbor. More specifically, the claims in this lawsuit involve Plaintiff Anthony Fazzino’s (“Mr. Fazzino’s”) allegation that the City of Bryan’s (the “City’s”) pumping from its Well No. 18 is affecting his groundwater and that the District has failed to protect him. Mr. Fazzino primarily requests damages for a taking of his property interest in groundwater. Alternatively, Mr. Fazzino requests injunctive relief that would require the District “to refrain from the conduct that has resulted in a taking of property without compensation.” Mr. Fazzino admittedly has no immediate or foreseeable need to use

the groundwater beneath his property. He did not protest the District's adoption of its 2004 rules that imposed production-based limits solely on new wells, but not on existing wells or the City's 2006 Well No. 18 permit application for an existing well, when he or his predecessor-in-interest had the statutory right to do so. Nor has he perfected his own permit application, which under the District's rules would authorize him to pump a substantial amount each year (up to 267.5 million gallons, or 821 acre feet of pumping per year). Rather, he brings this lawsuit arguing that it is just not fair for the City to pump groundwater within the vicinity of his property in an amount that he believes may be affecting him. Although he complains of the District's rules, his petition clearly and expressly only seeks damages for a taking of his property or, alternatively, an injunction ordering the District to refrain from the conduct causing the taking.

2. Mr. Fazzino complains of rulemaking and permitting that occurred more than 10 years ago. In 2004 the District adopted rules imposing acreage-based permit limits solely on "new wells," but not on "existing wells".¹ This distinction was authorized pursuant to Texas Water Code Section 36.116 (a)(2) and (b). Based on these 2004 rules, the District granted the City's 2006 application for an "existing well" identified as Well No. 18. Statutory law and District rules provided Mr. Fazzino and his predecessor-in-interest an opportunity to protest the City's requested permit at the 2006 permit hearing, but no timely protests were made. Also, Texas law provided Mr. Fazzino and his predecessor-in-interest an opportunity to challenge the 2004 adoption of these permitting rules and the applicability

¹ District Rule 1.1 defines an "existing well" as "a groundwater well within the District's boundaries, for which drilling or significant development of the well commenced before the effective date of the District's rules on December 2, 2004," and a "new well" as "any Well other than an existing well."

of these permitting rules to Mr. Fazzino’s property, but they failed to timely do so. Having failed to timely avail himself of the statutory remedies to protest in a timely manner, Mr. Fazzino is now pursuing two improper collateral attacks: one by this lawsuit, and the second by a complaint initiated at the District, which was referred to the State Office of Administrative Hearings (“SOAH”). In his complaint filed January 30, 2017, he sought revocation or reduction of the City’s Well No. 18 permit.² In the SOAH proceeding, Mr. Fazzino argued many of the same oil-and-gas law authorities that are again urged in this lawsuit and acknowledged that the case was a “test case.”³ On December 19, 2017, SOAH issued its final ruling dismissing Mr. Fazzino’s complaint for lack of jurisdiction.⁴

3. A third, alternative proceeding was initiated by Mr. Fazzino shortly after filing this lawsuit. Asserting that his concerns about groundwater impacts and a taking of his property could be resolved if he were to receive his own groundwater permit, he filed a groundwater permit application at the District on February 14, 2017. However, he withdrew that application, filed a new application on April 4, 2017, and allowed it to expire on August 25, 2017.⁵

II. ADDITIONAL BACKGROUND ON PARTIES, CITY WELL NO. 18 AND DISTRICT’S PERMITTING PROGRAM

4. Mr. Fazzino is an individual residing in the City of Bryan who owns a 25% undivided interest in a separate 26.65-acre tract located in Brazos County near the City’s

² Attachment 1 (administrative complaint and amended complaint).

³ Attachment 2 (excerpt of SOAH administrative record)(hearing transcript on October 19, 2017).

⁴ Attachment 3 (excerpt of SOAH administrative record)(Proposal for Decision, Findings of Fact and Conclusions of Law, and ruling on exceptions).

⁵ Attachments 4 (permit applications) and 5 (District correspondence dated September 6, 2017 and District legal counsel’s clarification on February 1, 2018).

Well No. 18. It is uncertain at this time whether the individuals and/or entities owning the remaining 75% undivided interests in the 26.65-acre tract support or are opposed to his claim and alleged groundwater interests.

5. The District is a governmental entity and political subdivision of the State of Texas responsible for management of the groundwater resources of Brazos and Robertson Counties, including the relevant aquifer at issue in this lawsuit, the Simsboro Sand unit within the Carrizo-Wilcox aquifer. Created as a conservation and reclamation district under Article XVI, Section 59 of the Texas Constitution, the District's authority and duties are established in Chapter 36 of the Texas Water Code; the District's enabling legislation, Chapter 8835 of the Texas Special District Local Laws Code; and other applicable law.

6. The City's Well No. 18 is authorized to pump groundwater pursuant to an "existing well" permit issued by the District. Three types of well operating permits are recognized by statute and in the District's rules that were established through formal public rulemaking over a decade ago: historic use permits, existing well permits, and new well permits. Historic use and existing well permits recognize landowners' investment and expectations in using wells that were previously drilled and in use or that were under significant development before the effective date of the District's 2004 rules. The District's relevant permit-allocation rules factor in the estimated annual usage of these historic and existing well permits along with aquifer conditions, other proposed uses, the effect on the supply and other permittees, the District's approved management plan and other factors in Sections 36.101 and 36.116 of the Texas Water Code.

7. Mr. Fazzino has argued in multiple venues and indicates in his First Amended Original Petition that it is unfair to treat the three types of permits different from one another.

It has been his asserted ultimate goal for City Well No. 18 to be subject to more restrictive permit conditions applicable to new wells. The District is of the position that Mr. Fazzino cannot by this lawsuit challenge its permitting program or the City's Well No. 18 permit. The District's three-tiered permit structure is specifically authorized under the comprehensive statutory permitting framework established in Chapter 36 of the Texas Water Code, was subject to well-settled principles of administrative law governing rulemaking, and is consistent with Texas case law.⁶

III. APPLICABLE LAW

8. This is a groundwater case governed by Texas groundwater law. Mr. Fazzino sidesteps established Texas groundwater law, instead relying heavily on oil-and-gas law, specifically the 1944 decision in *Marrs v. Railroad Comm'n* and 1962 decision in *Halbouty v. Railroad Comm'n*.⁷ He is correct in stating that the Texas Supreme Court borrowed from oil-and-gas principles in extending the ownership-in-place doctrine, in 2012, and the accommodation doctrine, in 2016, to groundwater disputes,⁸ but is wrong in claiming that *Marrs* and *Halbouty* apply to this lawsuit. *Marrs* involves a statutorily authorized and *timely* filed Railroad Commission ("RRC") proration order suit⁹ and *Halbouty* was a *timely* filed direct appeal of a RRC compulsory natural gas and condensate cycling and pressure

⁶ See, e.g., *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833-35 (Tex. 2012); *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 77-81 (Tex. 1999).

⁷ See *Marrs v. Railroad Comm'n*, 142 Tex. 293, 177 S.W.2d 941 (1944) and *Halbouty v. Railroad Comm'n*, 163 Tex. 417, 357 S.W.2d 364 (1962).

⁸ First Am. Pet. at n. 1 (citing *Day*, 369 S.W.3d 814 and *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016)).

⁹ The suit was filed pursuant to Act approved Feb. 12, 1925, 39th Leg., R.S., ch. 7, *repealed by* Act of May 24, 1977, 65th Leg., R.S., ch. 871, § 1, sec. 2(a)(2) [Article 6049c, Section 8 of Vernon's Annotated Revised Civil Statutes].

maintenance order.¹⁰ None of the Natural Resource Code statutes, RRC rules, or factual circumstances in *Marrs* and *Halbouty* are relevant to the instant case. Moreover, the comprehensive statutory permitting framework established in Chapter 36 of the Texas Water Code and District's rules is what applies to this case, and is what has been recognized by the Texas Supreme Court as the preferred approach to groundwater management.¹¹

9. Mr. Fazzino's authorities *do* underscore the importance of timely filing a lawsuit in accordance with available statutory remedies. Unlike Mr. Fazzino, the plaintiffs in *Marrs* and *Halbouty* timely filed their claims pursuant to *applicable* oil-and-gas statutes and RRC regulations. If Mr. Fazzino had timely challenged the District's decision on the Well No. 18 permit, then he could have vetted the applicable Texas Water Code statutes and District regulations, which provide for comprehensive regulation of spacing of and production from Simsboro groundwater wells.

IV. PLEA TO THE JURISDICTION

10. A plea to the jurisdiction challenges the jurisdiction of the Court to hear and decide a case.¹² Analysis of whether this authority exists begins with an examination of a plaintiff's live pleadings to determine whether they demonstrate or negate jurisdiction.¹³ A Texas court will also consider evidence submitted by the parties when necessary to resolve the jurisdictional issues.¹⁴ If the material facts are undisputed, the court shall decide the plea

¹⁰ Jurisdiction was taken pursuant to Tex. Const. art. V, § 3-b and Tex. Rev. Civ. Stat. Ann. art. 1738a *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 480 § 26(1).

¹¹ *Day*, 369 SW.3d at 835, 843. Notably, in *Coyote Lake Ranch*, 498 S.W.3d 53, groundwater district regulation was not at issue.

¹² *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

¹³ *Id.*

¹⁴ *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

as a matter of law.¹⁵ A plea to the jurisdiction is a dilatory plea with the purpose of defeating a cause of action “without regard to whether the claims asserted have merit.”¹⁶

11. Mr. Fazzino’s takings claim involving the City’s Well No. 18 permit is jurisdictionally flawed for multiple reasons. First, it is untimely and barred by the statute of limitations applicable to takings claims, which is either a two-year, four-year, or 10-year statute of limitations, as well as the doctrine of laches.¹⁷ Second, the three-year statutory window for challenging any act or proceeding of a district, including the challenge of a rule, has long since passed. Third, Texas law does not allow a takings claim to be predicated on a claim that a governmental entity failed to take some action or took some action affecting a third party’s property that indirectly affected plaintiff. Fourth, if Mr. Fazzino’s takings claim is based on an allegation that the District has denied his right to drill a well or pump groundwater, he has not exhausted administrative remedies available to him under the permitting statutes in Chapter 36 of the Texas Water Code and the District’s rules. Fifth, the type of water-rights reallocation sought by Mr. Fazzino is contemplated by public rulemaking pursuant to Chapter 36 of the Texas Water Code and not by the injunctive relief sought in this lawsuit. Finally, his request for injunctive relief is not authorized under Chapter 36 of the Texas Water Code.

¹⁵ *Miranda*, 133 S.W.3d at 228.

¹⁶ *Gonzalez Cty. Underground Water Conservation Dist. v. Water Prot. Ass’n*, No. 13-11-00319-CV, 2012 WL 1964549, at *2 (Tex. App.—Corpus Christi May 31, 2012, no pet.) (mem. op.).

¹⁷ *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 133-34 (Tex. App.—San Antonio 2013, pet. denied)(adopting 10-year statute of limitations but recognizing that Texas Supreme Court has not clarified whether perhaps a two-year or four-year statute may apply).

A. Statute of limitations bars takings claim.

12. The opportunity to protest the City's Well No. 18 permit application for an existing well and to appeal the District's decision to grant the City's Well No. 18 permit as an existing well was in 2006 when the District acted to grant that application. The opportunity to challenge the District's 2004 rules imposing acreage-based production limits solely on new wells and its applicability to Mr. Fazzino's interests was in 2004 when the District acted to adopt and immediately implement those rules through open public hearings and meetings as required by Texas law. Mr. Fazzino's takings claim is predicated on the District's action, more than 10 years ago, to adopt permit-allocation rules and then grant the Well No. 18 permit application. The 2004 rules as applied to Mr. Fazzino and his predecessor-in-interest's interests in groundwater have not substantively changed since 2004, and challenging those rules in late 2017 is too late. Consequently, these claims are untimely and barred by the statute of limitations applicable to takings claims, which is either a two-year, four-year, or 10-year statute of limitations, as well as the doctrine of laches.¹⁸

B. Validation statute and doctrine of laches bar takings claim and request for injunction.

13. Section 36.124(a) and (b) of the Texas Water Code conclusively presume the validity of the District's actions challenged by Mr. Fazzino, including the rules complained of, which were adopted several years ago and which are not of the type of rules exempted from challenge under § 36.124(b)(3). Given the passage of three years from the effective date of the 2004 rules and 2006 decision of the District on the Well No. 18 permit without

¹⁸ *Id.*

having filed a lawsuit to annul or invalidate these rules and decision, Mr. Fazzino is foreclosed from filing this lawsuit in 2017.

14. The doctrine of laches rests upon “the long-established doctrine of courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance.”¹⁹ In analyzing the application of the doctrine of laches in the framework of a regulatory takings claim, the Texas Supreme Court explained that a regulatory takings claim challenging a land-use restriction (*cf.* Plaintiff’s challenge to the District’s Production-Based Acreage Rule) becomes ripe “when the restriction is imposed.”²⁰ The restriction at issue is the District’s Production-Based Acreage Rule. That rule was effective immediately to all landholders in the District, in 2004. To the extent Mr. Fazzino is focused on its applicability to the Well No. 18 permit application, the application was prepared and submitted in light of the 2004 rule and was reviewed then granted by the District in 2006. Thus, any regulatory takings claim against this rule became ripe in 2004, and arguably in 2006.

15. The District’s Production-Based Acreage Rule has been in place for over a decade, and thus Plaintiff’s challenge thereto is now barred by both the statute of limitations and the doctrine of laches. An unreasonable amount of time has passed for Mr. Fazzino now to challenge this rule in the form of a regulatory taking and request for injunctive relief. In addition, Mr. Fazzino’s claims regarding the District’s Production-Based Acreage Rule is further barred by laches given that since the enactment of this rule there has been a “change

¹⁹ *Hays v. Port of Seattle*, 251 U.S. 233, 238-39, 40 S. Ct. 125, 127, 64 L. Ed. 243 (1920).

²⁰ *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 62–63 (Tex. 2006) (Hecht, dissenting).

of conditions” within the District’s jurisdiction, specifically compliance with the rule and reliance thereon *by every other permittee within the District* and, as the Court explained in *Hays*, it would be unjust to disturb the status quo of lawfully adopted regulations some 13 years later after the fact.

C. No jurisdiction for takings claim based on regulator’s inaction or indirect action.

16. Texas law does not recognize a takings claim for the failure to regulate or act, nor does it recognize a taking of certain property that results from governmental action as to *another* property. In *Harris County Flood Control District v. Kerr*, the Texas Supreme Court dismissed a takings claim against a Texas water district on those very grounds.²¹ The plaintiffs in *Kerr* argued that a taking of their property occurred as a result of governmental action with regard to a *different* property not owned by plaintiffs and as a result of the District’s *inaction* in not fully implementing a flood prevention plan. The Court held that “[o]nly *affirmative conduct* by the government will support a takings claim.”²²

17. A takings claim can be successfully brought when there is demonstrable intent to act by the governmental entity vis-à-vis a specific, identifiable property. Under Texas law a governmental entity such as the District “cannot be liable for a taking if it committed *no intentional acts*,”²³ and the Court in *Kerr* definitively stated that it has “*not recognized a takings claim for nonfeasance*.”²⁴ The Court in *Kerr* explained that such “requisite intent” is

²¹ *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016).

²² *Id.* at 799 (emphasis added).

²³ *Id.* at 800 (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997)) (emphasis added).

²⁴ *Id.* at 800 (emphasis added).

present when a governmental entity “knows that a *specific* act is causing *identifiable* harm.”²⁵ The Court in *Kerr* addressed the “specificity element” in observing that Texas “caselaw indicates that in order to form the requisite intent, *the government ordinarily knows which property it is taking.*”²⁶ The Court noted that such requisite intent is identified in a situation where “a governmental entity is aware that its action will necessarily cause physical damage to *certain* private property” but determines that the public benefit outweighs the identifiable harm to the “certain” private property.²⁷ Put another way, the government must be aware of the fact that “a *specific* act is causing *identifiable* harm” or know that “*specific property damage* is substantially certain to result from an authorized government action.”²⁸

18. Claims as brought by Mr. Fazzino and by the plaintiffs in *Kerr* do not fit Texas’s takings jurisprudence. Mr. Fazzino is not complaining about regulation of *his* property but regulation of *other* private properties and has not based his takings claims on excessive regulation, but *insufficient regulation*.²⁹ In *Kerr*, plaintiff’s claims against the governmental entity on the basis that it “*did not regulate enough*” were dismissed because they did not amount to a constitutional taking under Texas law.³⁰ Mr. Fazzino brings a similar “uncharted theory” and the Court in the instant case, just as the Court in *Kerr*, should “pause to ponder whether the claim, even if factually supported, is the stuff of a constitutional taking.”³¹

²⁵ *Id.* (quoting *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)) (emphasis in original); see also *Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004).

²⁶ *Kerr*, 499 S.W.3d at 800 (emphasis added).

²⁷ *Id.* (quoting *Jennings*, 142 S.W.3d at 314) (emphasis in original).

²⁸ *Kerr*, 499 S.W.3d at 800 (quoting *Jennings*, 142 S.W.3d at 314) (emphasis in original).

²⁹ *Kerr*, 499 S.W.3d at 801 (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ *Id.*

19. In discussing its decision to dismiss the case in *Kerr*, the Court perfectly encapsulated one of the many reasons for dismissal of Mr. Fazzino’s case presently, stating:

We have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, **such as granting permits** or approving plats, will result in damage to some **unspecified parcel of land within its jurisdiction.**³²

For all of these reasons enunciated above, which mirror those in *Kerr*, this case should be dismissed because there is no basis in Texas law to grant the relief sought by Mr. Fazzino, even taking all facts that he has alleged to be true.

D. Mr. Fazzino has not exhausted administrative remedies available to challenge the City’s Well No. 18 permit application and to pursue his own groundwater production permit.

20. Mr. Fazzino claims jurisdiction in this Court by way of Section 36.251 of the Texas Water Code and Article I, Section 17 of the Texas Constitution. Section 36.251 provides that a suit may be brought against a groundwater conservation district by a person dissatisfied with any rule or order made by that district, but *only* after all administrative appeals to the district are final. The Texas Supreme Court recognizes this exhaustion requirement before a party may seek recourse through judicial review of a regulatory determination. As recently as 2016, the Court held that when the Texas Legislature expressly or impliedly grants a regulatory agency sole authority to make an initial determination in a given subject matter, then that agency has exclusive jurisdiction over that subject matter and a party “*must* exhaust its administrative remedies before seeking recourse through judicial review.”³³ The Court in *Marquez* observed that this requirement is not

³² *Id.* at 800 (emphasis added).

³³ *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 544 (Tex. 2016) (quoting *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013)) (emphasis added).

meant to “deprive parties of their legal rights,” but instead simply “honors the Legislature’s intent that ‘the appropriate body adjudicates the dispute’ first.”³⁴

21. Although Mr. Fazzino alleges that the “District has therefore prohibited Plaintiff from drilling and operating a well that would allow him a fair opportunity to produce a fair share of the groundwater in the Simsboro aquifer, and has prohibited him from taking action to prevent or mitigate the impact that Well No. 18 is having and will continue to have on his privately owned property,”³⁵ he has ignored available remedies under Chapter 36 of the Texas Water Code and the District’s rules. The District’s General Manager offered to declare Mr. Fazzino’s application administratively complete and set it for hearing if Mr. Fazzino would amend the application to request an annual Simsboro groundwater production level up to 821 acre feet (267.5 million gallons per year) consistent with the District’s rules.³⁶ Because Mr. Fazzino failed to conform his application to the District’s permitting rules as requested by the General Manager, the Board was never given an opportunity to render a final decision on his application, and thus the administrative remedies available to Mr. Fazzino have not been exhausted.

22. Chapter 36 of the Texas Water Code grants the state’s groundwater conservation districts sole authority over decisions on groundwater permit applications and other matters related to the conservation, preservation, protection, and management of groundwater resources. Just as in the Texas case law cited above, at issue is “whether the

³⁴ *Marquez*, 487 S.W.3d at 544 (quoting *Essenburg v. Dallas Cty.*, 988 S.W.2d 188, 189 (Tex. 1998) (per curiam)).

³⁵ First Amended Petition at Para. 17.

³⁶ Attachment 5 (District correspondence to Mr. Fazzino dated September 6, 2017 and District legal counsel’s clarification on February 1, 2018).

law requires [Mr. Fazzino] to first seek that relief through an administrative process before [he] can seek redress from the courts.”³⁷ The law, specifically Section 36.251(c), *does* require Mr. Fazzino to first seek relief through the administrative process, and thus the Court’s inquiry in this matter should end upon that determination. Importantly, Texas courts hold that the exhaustion requirement exists in the specific context of challenging an administrative action or decision of a groundwater conservation district in state court. The court in *Gonzalez County Underground Water Conservation District v. Water Protection Association* made it clear that exhaustion of *all* administrative remedies available in the rules of a groundwater conservation district is a mandatory prerequisite to the invocation of state court jurisdiction to hear an appeal.³⁸

23. Mr. Fazzino did not timely protest the Well No. 18 permit application and therefore failed to exhaust administrative remedies that are a prerequisite to challenging that permit application. It is telling that Mr. Fazzino abandoned his arguments and factual assertions regarding alleged drainage of Mr. Fazzino’s groundwater by the City’s pumping at Well No. 18. Mr. Fazzino’s entire case has been based on claims that the City has been draining his groundwater and lowering aquifer levels that affect his groundwater. Apparently Mr. Fazzino recognized that Texas law does not recognize a claim for ordinary drainage or that the administrative record in the SOAH proceeding included evidence that there was de minimis drainage, at most. Mr. Fazzino has amended his petition to argue that

³⁷ *Marquez*, 487 S.W.3d at 545.

³⁸ *Gonzalez Cty. Underground Water Conservation Dist. v. Water Prot. Ass’n*, No. 13-11-00319-CV, 2012 WL 1964549, at *3 (Tex. App.—Corpus Christi May 31, 2012) (citing *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 588 (Tex. App.—San Antonio 2006, no pet.); *Hill v. Board of Trustees*, 40 S.W.3d 676, 678 (Tex. App.—Austin 2001, no pet.); quoting Tex. Water Code Ann. § 36.251) (emphasis added).

the City's Well No. 18 permit unreasonably affects his groundwater interests. Chapter 36 of the Texas Water Code provided Mr. Fazzino or his predecessor-in-interest an opportunity to protest Well No. 18 on that ground but they failed to do so.³⁹

24. Furthermore, while Mr. Fazzino's permit application was deemed not administratively complete and expired by operation of law due to Mr. Fazzino's failure to correct the identified deficiencies, Mr. Fazzino may at any time re-file his application.

25. It should be pointed out that Mr. Fazzino is of the position that to remedy the alleged damage caused by the City's groundwater pumping, he must be able "to produce a large enough volume of groundwater to protect himself against drainage by Bryan's Well No. 18 and to allow him a fair opportunity to produce a fair share of the groundwater in the common reservoir."⁴⁰ Mr. Fazzino alleges that his groundwater resources are adversely affected by the City's pumping from Well No. 18 and that "[a]ccording to the District's best available science, the groundwater belonging to Plaintiff is within the cone of depression impact of Well No. 18 and is therefore being impacted by production from that well."⁴¹ However, Mr. Fazzino's own expert at the Thornhill Group, Eric Seeger, P.G., produced a sealed report opining that there is sufficient water for Mr. Fazzino to annually produce 4,839 acre feet (1.6 million gallons) at the rate of 3,000 gallons per minute as requested in his application.⁴² In this report Mr. Seeger concludes:

[P]rojected effects of long-term production will be minimal...Based on the production rate and highly productive characteristics of the local Simsboro

³⁹ Tex. Water Code Ann. Subchapter M and § 36.113(d)(2).

⁴⁰ Attachment 6 (Letter dated February 16, 2017, from Mr. Fazzino's legal counsel to the District).

⁴¹ First Amended Petition at Para. 9.

⁴² Attachment 7 (April 14, 2017 Thornhill Group, Inc.'s Simsboro Aquifer Impact Assessment – Anthony [sic] Fazzino, Jr. Permit Application).

aquifer, there will be a minimal effect on other groundwater users in the BVGCD...Production from the subject well will not cause depletion from the aquifer, as all water will come from a reduction in artesian pressure.⁴³

The District's expert, John Seifert, P.E., peer-reviewed Mr. Seeger's sealed report, concluding that "[this] finding in the Thornhill Group report regarding the Fazzino, Jr. proposed well is consistent with my opinion regarding the flow and pumping effects that occur."⁴⁴

E. Mr. Fazzino's claim associated with his alleged groundwater interests is not ripe.

26. Mr. Fazzino's claim that he has been deprived of his fair share of groundwater fails to recognize well-established groundwater permitting law that allows him to apply for his own permit to obtain his fair share. It is an especially curious position for him to take considering that he has, in fact, recently applied to the District for a groundwater production permit but opted not to pursue it (see discussion above). Mr. Fazzino has not alleged that the District ever denied a permit application of any property owner in the area. Permitting is the vehicle by which Texas statutory law provides for authorizing groundwater pumping. To deprive a landowner of their fair share indicates the District has denied that landowner's permit application. Mr. Fazzino has not alleged a denial of any permit application and are therefore misplaced in pointing to a third party's existing permit rather than their own application for a permit.

27. Ripeness is an element of subject-matter jurisdiction that corresponds to the exhaustion requirement discussed above.⁴⁵ The ripeness doctrine exists, in part, to prevent

⁴³ *Id.*

⁴⁴ Attachment 8 (Affidavit of John Seifert, P.E.).

⁴⁵ *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

courts from improperly issuing advisory opinions.⁴⁶ Takings under Texas jurisprudence are generally divided into two distinct categories, physical and regulatory.⁴⁷ A physical taking requires the unwarranted physical occupation of property, while a compensable regulatory taking occurs when the government “imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interferes with the owner’s right to use and enjoy the property.”⁴⁸ There has been no physical invasion of Mr. Fazzino’s property by the District, and thus his claim is properly characterized as regulatory.

28. Given the relatively limited Texas case law on the ripeness of a claim for a regulatory taking, the Texas Supreme Court in *Mayhew* turned to federal case law for guidance on the issue of determining the ripeness of constitutional challenges.⁴⁹ The Court in *Mayhew* importantly observed that in the federal jurisprudence there is an “essential prerequisite” to a takings claim that requires “a final and authoritative determination” by the governmental entity.⁵⁰

29. Fortunately, there is a decision from a Texas federal court that involves the ripeness of a regulatory takings claim by a property owner against a groundwater conservation district.⁵¹ The federal court in *Coates* dismissed the plaintiffs’ constitutional claims because they were not ripe. The court in *Coates* explained that there are two

⁴⁶ *Id.*

⁴⁷ *Mayhew*, 964 S.W.2d at 933.

⁴⁸ *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex.App.—Dallas 2006, no pet.) (citing *Mayhew*, 964 S.W.2d at 935).

⁴⁹ *Mayhew*, 964 S.W.2d at 928–29 (citing *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (“[b]ecause standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.”)).

⁵⁰ *Mayhew*, 964 S.W.2d at 929.

⁵¹ See *Coates v. Hall*, 512 F. Supp. 2d 770 (W.D. Tex. 2007).

“independent prudential hurdles to a regulatory takings claim.”⁵² To clear these hurdles a plaintiff must demonstrate that there exists “[(1)] a ‘*final decision regarding the application of the [challenged] regulations to the property at issue*’ from ‘the government entity charged with implementing the regulations’ and [(2) the plaintiff] sought ‘compensation *through the procedures the State has provided for doing so.*’”⁵³ A Texas court cannot evaluate a “regulatory taking claim until Plaintiffs demonstrate that they have been denied compensation *after pursuing available state procedures.*”⁵⁴ In the instant case, Mr. Fazzino failed to timely pursue the state procedures governing protest of the City’s Well No. 18 permit application. Additionally, Mr. Fazzino began then abandoned efforts at pursuing the state procedures available to secure his own permit.

F. The District has treated each similarly situated class of permit holders the same.

30. Mr. Fazzino claims that the District’s “unequal application of its rules” does not allow Mr. Fazzino the opportunity to offset or mitigate the impact of the City’s production from Well No. 18, and “[t]herefore the District’s regulatory scheme as applied to Plaintiff has resulted in a taking of Plaintiff’s constitutionally protected property without compensation to Plaintiff...”⁵⁵ The District has never applied its rules to any property owned by or permit application submitted by Mr. Fazzino, and thus an “as applied” challenge to the District’s rules is unavailable to him. The District stands ready to process a permit application from Mr. Fazzino for up to 821 acre feet (267.5 million gallons) of pumping per year from his 25% undivided interest in a 26.65-acre tract.

⁵² *Id.* at 784 (citing *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733 (1997)).

⁵³ *Id.* (quoting *Suitum*, 520 U.S. at 734) (emphasis added).

⁵⁴ *Id.* at 788.

⁵⁵ Pls. First Am. Pet. ¶ 22.

31. The District's overall, comprehensive regulatory framework was established in full recognition of and adherence to the guidance and dictates of the District's enabling act,⁵⁶ Chapter 36 of the Texas Water Code, and Texas case law. The District's essential *permitting* framework, including the District's approach to production allocation based on surface acreage, aquifer thickness, and spacing, was established soon after the District was created by the Texas Legislature and confirmed by election of the District's constituents. The District's Board adopted this permitting framework by taking into consideration the many factors identified in Chapter 36 of the Texas Water Code and Texas case law.⁵⁷ This permitting framework reflects and is consistent with the District's overall regulatory framework, which includes but is not limited to implementing the District's Management Plan and achieving statutorily mandated Desired Future Conditions.⁵⁸ A major element of the evolution of the District's regulatory framework involves an ongoing consideration by the District's Board of best available science concerning the aquifers within the District's jurisdiction, landowners' needs for the groundwater, locations of withdrawal, and input from constituents about the optimal permitting approach. It is ultimately through rulemaking that this input, analysis, and policymaking occurs. The District's permitting program takes into account the surface acreage of the property that is the subject of a permit application in determining the amount of authorized groundwater production, while also recognizing

⁵⁶ Tex. Spec. Dist. Local Laws Code Ann. Ch. 8835.

⁵⁷ See e.g., Tex. Water Code Ann. §§ 36.0015, 36.101, 36.116; *Edwards Aquifer Auth.*, 369 S.W.3d at 840-41. Texas Water Code §§ 36.101 and 36.116 and the Texas Supreme Court's holding in *Edwards Aquifer Authority* require that a District's groundwater permit allocation approach be established by rulemaking after considering certain factors, among them including the proposed use of water, historic use, the effect on the supply and other permittees, and a district's approved management plan. *Edwards Aquifer Auth.*, 369 S.W.3d at 840-41 (Tex. 2012).

⁵⁸ Tex. Water Code Ann. §§ 36.1071, 36.108.

historic use and wells *existing or under development* at the time its 2004 rules were adopted, all which are legally justifiable approaches to allocation.⁵⁹ But these issues are appropriate policy questions for a rulemaking hearing or stakeholder group discussions, *not a lawsuit seeking takings damages or injunctive relief*. There is no basis under applicable law to grant the relief sought by Mr. Fazzino in this proceeding, and this lawsuit should be dismissed on this basis and for other reasons in this plea and motion.

G. Chapter 36 of the Texas Water Code does not recognize injunctive relief.

32. Mr. Fazzino asserts that injunctive relief may be granted pursuant to Section 36.251 of the Texas Water Code. However, Section 36.251 provides no such remedy, nor does any other section of the Texas Water Code. Furthermore, the essential relief sought by Mr. Fazzino is not injunctive in nature and the request for an injunction is misplaced.

V. GENERAL DENIAL

33. Subject to, and without waiving the District Defendant's Plea to the Jurisdiction, pursuant to Texas Rule of Civil Procedure 92, the District denies each and every, all and singular, the allegations of Plaintiff's Original Petition and demand strict proof thereof.

VI. SPECIFIC DENIALS AND AFFIRMATIVE DEFENSES

34. Pleading further and without waiving the District's Plea to the Jurisdiction, the District asserts the following specific denials:

⁵⁹ See, e.g., District Rules 1.1(15), (20), (28) and Sections 7 and 8 (recognizing three types of operating permits). Three types of well operating permits are recognized by the District and were established through rulemaking over a decade ago: historic use permits, existing well permits, and new well permits.⁵⁹ The Well 18 Permit is an *existing* well permit. Mr. Fazzino would like to reclassify Well 18 from an existing well to a new well because new wells are subject to more restrictive permit conditions than those applicable to existing wells.

- (1) the Petition fails to state facts sufficient to constitute a drainage-based or drawdown-based takings cause of action against the District;
- (2) the Petition fails to state a claim that is ripe for a decision at this time;
- (3) the doctrine of laches bars the Petition because of the initiation of this lawsuit several years after the complained-of rules were adopted and action taken to issue permits pursuant to those groundwater allocation provisions of those rules; and
- (4) the Petition fails to present a claim for relief that has a basis in Texas law.

**VII. REQUEST FOR COURT COSTS AND ATTORNEYS' FEES
IN ACCORDANCE WITH TEXAS WATER CODE § 36.066(g) and (h)**

35. If the Court denies Mr. Fazzino's requests for relief or if the District prevails on some of the issues, then the District is entitled to a statutorily mandated award of attorneys' fees and court costs in accordance with Section 36.066(g) and (h) of the Texas Water Code. The District respectfully requests that an opportunity be provided to submit an affidavit and evidence of attorneys' fees and court costs and to conduct a hearing if the parties are unable to reach agreement on the § 36.066 award.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the District withdraws its motion to dismiss pursuant to Texas Rule of Civil Procedure 91a and respectfully requests that the Court grant all of the relief set forth above. Specifically, the District requests the Court to grant the following relief:

- (1) grant the Plea to the Jurisdiction and dismiss Plaintiff's First Amended Original Petition;
- (2) order that Mr. Fazzino take nothing by this lawsuit and that the District recover its costs and attorneys' fees if it prevails in accordance with Texas Water Code § 36.066(g) and (h), including an opportunity for the District to submit an affidavit and evidence of its § 36.066(g) and (h) costs and fees; and

(3) order such other relief to which it may be entitled at equity or law.

ATTACHMENTS:

- Attachment 1 Mr. Fazzino and his member-association BVGRA's administrative complaint and amended complaint
- Attachment 2 Transcript of SOAH hearing held October 19, 2017
- Attachment 3 SOAH's Proposal for Decision, Findings of Fact and Conclusions of Law, and ruling on exceptions
- Attachment 4 Mr. Fazzino's permit applications
- Attachment 5 District correspondence dated September 6, 2017 and District legal counsel's clarification on February 1, 2018
- Attachment 6 Letter dated February 16, 2017, from Mr. Fazzino's legal counsel to the District
- Attachment 7 April 14, 2017 Thornhill Group, Inc.'s Simsboro Aquifer Impact Assessment – Anthony [sic] Fazzino, Jr. Permit Application
- Attachment 8 Affidavit of John Seifert, P.E.

Respectfully submitted,

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GROUNDWATER CONSERVATION
DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2018, a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure on the following counsel of record:

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Michael A. Gershon

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:



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RECEIVED

AUG 16 2017

SOAH DOCKET NO. 960-17-4513

Lloyd Gosselink

IN THE MATTER OF THE
COMPLAINT OF THE BRAZOS
VALLEY GROUNDWATER
RIGHTS ASSOCIATION AND
ANTHONY FAZZINO AGAINST
THE CITY OF BRYAN BEFORE
THE BRAZOS VALLEY
GROUNDWATER CONSERVATION
DISTRICT

§
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§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

FIRST AMENDED COMPLAINT

The Brazos Valley Groundwater Rights Association and one of its members, Tony Fazzino, Petitioners, pursuant to 1 Texas Administrative Code § 155.301, make the following complaint against the City of Bryan, Respondent, and its Well No. 18, and in support thereof would show the following:

1. Brazos Valley Groundwater Rights Association (“BVGRA”) is an association of property owners, primarily owning property within the Brazos Valley Groundwater Conservation District (“BVGCD” or “District”), dedicated to protection of the owners’ rights in groundwater and to monitoring actions of BVGCD that impact those property rights.
2. Tony Fazzino is a member of BVGRA and with his siblings owns 26.65 acres of land in close proximity to the tract upon which City of Bryan Well No. 18 is located. Groundwater beneath his property that he owns is being drained by Bryan Well No. 18.
3. The City of Bryan owns and operates Well No. 18, under the authority of an operating permit issued by the District, BV-DO-0003, which authorizes production of 4,838 acre-feet per year at a rate of 3,000 GPM from a 2.7 acre tract – or *almost 1800 acre-feet per acre per year*.
4. Both the District’s rules, Rule 8.7(6), and the Well No. 18 operating permit, Special Condition 6, provide that “[a] finding that false information has been supplied [as part of the permit application] is grounds for immediate revocation of the permit.”
5. The City of Bryan’s application for BV-DO-0003, filed June 8, 2006, falsifies critical information. Regarding application of the acreage requirement currently found in District Rule 7.1(c), the City of Bryan’s application stated “This well was completed prior to adoption of this regulation.” (Emphasis in application). This is blatantly false. State water well drilling records show that Well No. 18 was started December 8, 2004 and completed

October 8, 2005. Rule 7.1(c) was originally adopted December 2, 2004 – *before* drilling of Well No. 18 was initiated.

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 8.9(e),¹ 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: /s/ Douglas G. Caroom

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¹ The original Complaint mistakenly referenced Rule 8.5(c) of the District's January 14, 2016 Rules. Rule 8.9(e) is its counterpart in the District's current rules, as adopted July 14, 2016.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, a true and correct copy of the foregoing document was delivered by electronic mail and U.S. Certified Mail, Return Receipt Requested, using the addresses indicated below.

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SOAH DOCKET NO. 960-17-4513

IN THE MATTER OF THE COMPLAINT) STATE OFFICE OF
OF THE BRAZOS VALLEY)
GROUNDWATER RIGHTS ASSOCIATION)
AGAINST THE CITY OF BRYAN) ADMINISTRATIVE HEARING

PREHEARING CONFERENCE

THURSDAY, OCTOBER 19, 2017

BE IT REMEMBERED THAT at 9:02 a.m., on Thursday, the 19th day of October 2017, the above-entitled matter came on for hearing at the State Office of Administrative Hearings, William P. Clements, Jr., Building, 300 West 15th Street, 4th Floor, Room 404, Austin, Texas, before WILLIAM NEWCHURCH, Administrative Law Judge, and the following proceedings were reported by Autumn J. Smith, Certified Shorthand Reporter.

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EXHIBIT INDEX

GM (GENERAL MANAGER)	MARKED ADMITTED
1. Brazos Valley Groundwater Conservation District General Manager's Motions, Response, and Authorities	33

1 P R O C E E D I N G S

2 THURSDAY, OCTOBER 19, 2017

3 (9:02 a.m.)

4 JUDGE NEWCHURCH: Let's go on the record.

5 This is a prehearing conference in
6 Docket 960-17-4513. That is the matter of the complaint
7 of the Brazos Valley Groundwater Rights Association
8 against the City of Bryan as a matter pending before
9 the -- I hope I get this right -- Brazos Valley
10 Groundwater Conservation District.

11 MR. GERSHON: Correct.

12 JUDGE NEWCHURCH: My name is Bill
13 Newchurch. I'm the administrative law judge presiding
14 today. We're at the Clements building in Austin. It's
15 October 19th, 2017.

16 Let's note the appearances of the parties,
17 and we'll start with the Petitioner, the Association.

18 MR. CAROOM: Doug Caroom representing the
19 Brazos Valley Groundwater Rights Association. With me
20 is the president of the Association, John Melvin, and
21 property owner member Mr. Tony Fazzino.

22 JUDGE NEWCHURCH: Good morning to all of
23 you.

24 And for the District, please.

25 MR. GERSHON: Yes. Mike Gershon with the

1 law firm of the Lloyd Gosselink Rochelle & Townsend. I
2 represent the General Manager of the Groundwater
3 Conservation District, Mr. Alan Day, who is also with us
4 today.

5 Mr. Day.

6 JUDGE NEWCHURCH: Good morning to both of
7 you.

8 And for the City of Bryan?

9 MR. J. MATHEWS: Jim Mathews for the City
10 of Bryan, and I'm joined today by Ben Mathews, also with
11 the City of Bryan.

12 JUDGE NEWCHURCH: Okay. Does anyone else
13 need to note an appearance today? I don't think so.

14 So this case was originally scheduled with
15 Judge Qualtrough or assigned to Judge Qualtrough as you
16 know and because of scheduling conflicts, it was
17 transferred to me.

18 And my understanding is the purpose of
19 today's preliminary hearing is to go over the motions
20 for summary disposition that have been filed, and
21 primarily to see if there was any questions and to
22 solicit any additional presentation parties might want
23 to make on these motions.

24 Is that everyone else's understanding,
25 that's what we're here for?

1 MR. GERSHON: Judge, if I may?

2 JUDGE NEWCHURCH: Yes, sir.

3 MR. GERSHON: As Order No. 5 reflected,
4 there were really two sets of issues that were within
5 the scope of today's hearing.

6 JUDGE NEWCHURCH: Yes, sir.

7 MR. GERSHON: The dispositive motions, as
8 you noted, both motions for summary disposition as well
9 as motions to dismiss. The General Manager has both.

10 In addition to that, Judge Qualtrough had
11 recognized that there were some jurisdictional questions
12 raised by two of the parties, and that set of
13 jurisdictional issues is subsumed within one of the
14 essential referred issues from the board of directors of
15 the Groundwater District. And so given that there are
16 the jurisdictional questions, my thinking is that we
17 could start with those jurisdictional issues first.

18 The counsel communicated yesterday about
19 how things might go today. There's a lot of material
20 before you.

21 JUDGE NEWCHURCH: There is.

22 MR. GERSHON: Quite a bit of paper in the
23 filings, and we thought that starting with at least -- I
24 believe we reached a consensus that addressing those
25 jurisdictional issues at the outset would make sense.

1 JUDGE NEWCHURCH: What I would like to do
2 is this: I've reviewed everything you filed and I think
3 I understand what's going on, and I have some
4 questions -- some foundational questions that I want to
5 make sure I've got right in my own mind and make sure
6 we've got a complete record on some important points.
7 And some of this I'm expecting little more than "yeah,
8 that's right." But I'm double-checking.

9 So am I correct that the District's
10 functions are governed by Chapter 8835 of the Texas
11 Special District Local Laws Code?

12 MR. GERSHON: Yes. That citation is to
13 the enabling legislation of the district.

14 JUDGE NEWCHURCH: Right.

15 MR. GERSHON: Beyond that enabling
16 legislation and as set forth in that enabling
17 legislation, which is special law, there's the general
18 law of Chapter 36 of the Water Code.

19 JUDGE NEWCHURCH: That's my next question.

20 So everybody is in agreement, then, that
21 Chapter 36 also applies to the District's operations?

22 MR. J. MATHEWS: Yes.

23 MR. CAROOM: Yes.

24 JUDGE NEWCHURCH: Okay. And let's see.
25 The Texas Water Code, Section 36.416(e), which is part

1 of Chapter 36 and I'll let you take a minute to get
2 there.

3 Everybody ready?

4 MR. GERSHON: Yes.

5 JUDGE NEWCHURCH: Okay. It says, (as
6 read) A District shall provide the administrative law
7 judge with a written statement of applicable rules or
8 policies.

9 My understanding is the two statutes we
10 just talked about are applicable. Have they been
11 provided on the record, because I don't think they have?
12 I don't think the District has filed a written document
13 that either included them or asked the judge to, say,
14 officially notice them and referring to them. Has
15 anything like that occurred?

16 MR. GERSHON: Judge, with respect to the
17 statute, you're correct. The statutes have not been
18 provided to Judge Qualtrough. I have a full set of the
19 enabling act and Chapter 36 in a binder prepared for you
20 that I would be glad -- we can provide a copy for the
21 record as well.

22 JUDGE NEWCHURCH: That would be great.
23 That might address some of my other questions.

24 MR. GERSHON: Now, this binder, in
25 addition to the statutes that I referred to, include all

1 of the General Manager's exhibits that were referenced
2 in the motions.

3 JUDGE NEWCHURCH: Yes.

4 MR. GERSHON: As well as the authorities
5 that are referenced in those two motions.

6 JUDGE NEWCHURCH: Okay. That may address
7 a lot of my questions. So the statute has been provided
8 as required by the statute.

9 The parties have had an opportunity to
10 examine this perhaps?

11 MR. CAROOM: (Shakes head side to side).

12 JUDGE NEWCHURCH: No. Would you like to?

13 MR. CAROOM: I think we trust him.

14 JUDGE NEWCHURCH: Okay.

15 MR. GERSHON: Judge, if I may? What I've
16 described are the statutes.

17 JUDGE NEWCHURCH: Yes.

18 MR. GERSHON: Beyond the statutes there
19 are district regulations in place --

20 JUDGE NEWCHURCH: That's where I am going
21 next.

22 The District hasn't provided, as far as I
23 can tell on the record, its rules that might be
24 applicable. Are those included in this binder also?

25 MR. GERSHON: They are. There are

1 multiple sets. There are the current version of the
2 rules and the 2004 version of the rules that were
3 applicable during the permitting at issue.

4 Now, there -- those rules are organized in
5 the table of contents that follows the General Manager's
6 motion for summary disposition.

7 JUDGE NEWCHURCH: Okay. The current set
8 of rules is under Exhibit GM E6 in this document -- in
9 this binder. Those are the rules that were -- became
10 effective on August the 10th of 2017.

11 MR. GERSHON: Correct.

12 JUDGE NEWCHURCH: Currently effective.

13 MR. GERSHON: Yes.

14 JUDGE NEWCHURCH: Procedural rules.

15 Right?

16 MR. GERSHON: Procedural and substantive.

17 JUDGE NEWCHURCH: Oh, okay. Usually
18 procedural rules that have been updated are applicable
19 to a process that's ongoing. Anybody dispute that?

20 MR. GERSHON: Agree with you, Judge.

21 JUDGE NEWCHURCH: Everybody is shaking
22 heads, so no one disputes that.

23 Substantive rules that were in place when
24 some activity happened generally remain applicable until
25 that activity, that action is terminated, is finalized.

1 Is that correct?

2 MR. CAROOM: (Nodding head up and down).

3 JUDGE NEWCHURCH: Shaking heads. That's a
4 general principle?

5 MR. GERSHON: Yes.

6 JUDGE NEWCHURCH: Okay. Mr. Gershon, go
7 ahead. You had something else.

8 MR. GERSHON: There is an additional set
9 of rules that were applicable at the time of the
10 permitting at issue back in 2006, 2007 time frame. And
11 let's see...

12 JUDGE NEWCHURCH: So that is...

13 MR. GERSHON: GM E5. Exhibit E5.

14 JUDGE NEWCHURCH: Okay. So three sets of
15 rules. Is that right?

16 MR. GERSHON: Well, there should be two
17 sets.

18 JUDGE NEWCHURCH: Two sets because the
19 application -- you're talking about activities when the
20 permit was being issued and that was before 2006.
21 Right?

22 MR. GERSHON: Rules that were adopted
23 before 2006. The Board's decisions were in 2006 and
24 2013 that are relevant. The 2013 decision ratified an
25 action in 2007. There were events in 2006, '7, and

1 '13 that were permitting specific. The rules in effect
2 at the time of the August 2006 decision were those 2004
3 rules that -- I'm sorry -- 2005 rules. November 3rd,
4 2005 rules that are at GM E5.

5 JUDGE NEWCHURCH: Okay. Let's try this.
6 Does any -- I propose to take official notice of the
7 rules that were in effect on August 3rd, 2006 as
8 reflected in GM E5 provided to me by the District -- by
9 the General Manager. Does anybody object to my taking
10 official notice?

11 MR. J. MATHEWS: What was the year?

12 JUDGE NEWCHURCH: That was August 3rd,
13 2006.

14 MR. GERSHON: 2005.

15 JUDGE NEWCHURCH: This says 2006.

16 MR. J. MATHEWS: That was the date of the
17 hearing where they approved the permit, August 3rd,
18 2006.

19 JUDGE NEWCHURCH: Okay. So the rules went
20 into effect November 3rd 2005.

21 MR. GERSHON: Correct.

22 JUDGE NEWCHURCH: They were in effect when
23 the permit was approved August 3rd, 2006.

24 MR. GERSHON: Yes.

25 JUDGE NEWCHURCH: Does anyone -- again,

1 anybody object to my taking official notice of that set
2 of rules as provided in the GM E5?

3 MR. CAROOM: No.

4 MR. GERSHON: Judge, these rules are also
5 in the record. When we had our initial preliminary
6 hearing and then our second preliminary hearing, Judge
7 Qualtrough I believe through her assistant had requested
8 the District's general counsel to provide the rules.
9 They were provided, and I believe the record reflected
10 that they're in the record as well.

11 JUDGE NEWCHURCH: Okay.

12 MR. GERSHON: So I believe there's a copy
13 in the file. Not to distract you. Just wanted to be
14 clear.

15 JUDGE NEWCHURCH: Okay. Just being clear.

16 So similarly I'm proposing to take
17 official notice of the current rules of the District as
18 reflected in Exhibit General Manager E6. These are the
19 rules that went into effect on August 10th, 2017. Is
20 there objection to my taking official notice of those
21 rules?

22 MR. CAROOM: No objection.

23 MR. J. MATHEWS: Your Honor, just so I'm
24 clear. You're take official notice of GM E5, and GM E6?

25 JUDGE NEWCHURCH: Correct.

1 MR. J. MATHEWS: Okay.

2 JUDGE NEWCHURCH: So let's talk about
3 SOAH's rules. The parties cite in their motions as all
4 parties do -- some parties do -- cite SOAH's procedural
5 rules and there is a section, Texas Water Code,
6 Section 36.416(a) and it says, among other things, (as
7 read) The District may adopt rules for a hearing
8 conducted under this section that are consistent with
9 the procedural rules of SOAH if the District contracts
10 with SOAH.

11 So my question is: Has the District in
12 any way adopted SOAH's procedural rules?

13 MR. CAROOM: Judge, I think Order No. 2 in
14 this case recites that the case would be conducted under
15 SOAH's rules.

16 JUDGE NEWCHURCH: Order No. 2 of?

17 MR. CAROOM: Of this case.

18 JUDGE NEWCHURCH: Of the District?

19 MR. CAROOM: No, in this hearing.

20 JUDGE NEWCHURCH: Right. Has the District
21 adopted SOAH rules?

22 MR. GERSHON: I'm about to tell you. I've
23 got the rules.

24 JUDGE NEWCHURCH: Let's try this. Because
25 I'm the team leader of the Natural Resources Team, I

1 have some knowledge of contracts with districts and
2 others who we conduct hearings for. I think there is a
3 contract provision, although it's not in evidence in
4 this case, where the District -- when it's a contract
5 with SOAH -- said SOAH's rules will apply.

6 MR. GERSHON: And they do. I was looking
7 for the cite. It's Rule 14.4(c)(1).

8 JUDGE NEWCHURCH: Taking a current rule?

9 MR. GERSHON: Current rule. It reads, (as
10 read) General Permit-related Hearing Procedures. A
11 hearing must be conducted by a court or an individual to
12 whom responsibilities have been delegated to serve as
13 hearing examiner.

14 And then we come down to (c)(1) and it
15 says, (as read) Hearings under the State Office of
16 Administrative Hearings.

17 Subsection 1 reads essentially as the
18 statute does, which reads, (as read) If the District
19 contracts with the State Office of Administrative
20 Hearings to conduct a hearing, the hearing shall be
21 conducted as provided by Subchapter C, D, and F of
22 Chapter 2001 of the Government Code.

23 It continues on to say, (as read) The
24 District may adopt rules for hearing conducted under
25 this section that are consistent with those rules.

1 JUDGE NEWCHURCH: So I've seen that and it
2 also as you've read says "may adopt." My question is:
3 Has the District adopted?

4 So let's try this. I'm going to propose
5 to take official notice of the contract between SOAH and
6 the District in which the District, one of the
7 contractual terms that the District agreed to is that
8 SOAH's procedural rules would apply.

9 Does anybody -- I don't have that to
10 present to you. Does anybody object to my taking
11 official notice?

12 MR. CAROOM: No objection.

13 MR. GERSHON: No objection. The General
14 Manager expected to apply those rules.

15 JUDGE NEWCHURCH: Okay. There we go. The
16 District in its current rules and probably in its
17 earlier rules has certain procedural rules that are
18 applicable. This is -- I think it's Rule 14.4,
19 Mr. Gershon? The procedural rules of the District.

20 MR. GERSHON: There are procedural rules
21 of the District in 14.4 as well as other provisions of
22 Section 14 that provide for procedures during hearings.

23 JUDGE NEWCHURCH: Right. So given the
24 official notice that the District has adopted SOAH's
25 procedural rules, my understanding -- and I want to see

1 if the parties are in agreement with this -- is that the
2 District's procedural rules apply, and to the extent the
3 District's procedural rules don't address a point,
4 SOAH's procedural rules apply because they've been
5 adopted by the District through contract.

6 Everybody want to think about that for a
7 second? Does that make sense?

8 MR. GERSHON: Yes.

9 MR. CAROOM: (Nodding head up and down).

10 JUDGE NEWCHURCH: I'm seeing shaking
11 heads. Mr. Mathews?

12 MR. J. MATHEWS: Yeah.

13 JUDGE NEWCHURCH: Okay. I don't see any
14 District rules concerning dismissals or summary
15 disposition. Am I missing something? Because the
16 parties are citing SOAH's procedural rules, I just want
17 to make sure that there's no District procedural rules
18 on those points, in which case SOAH's procedural rules
19 apply.

20 MR. GERSHON: The rules don't expressly
21 use the terminology "summary disposition and dismissal."

22 JUDGE NEWCHURCH: Yes.

23 MR. GERSHON: I believe that Code
24 Chapter 36 of the Water Code and the rules contemplate
25 board decisions of permitting matters, whether those

1 matters would involve a traditional application for a
2 permit or a traditional application to amend a permit or
3 this unique complaint that we're addressing today.

4 But agreed there's no express language in
5 the rules that address summary disposition or dismissal
6 per se.

7 JUDGE NEWCHURCH: Okay. Shaking heads.
8 So everybody is in agreement that we look to the SOAH
9 procedural rules on summary disposition and dismissals?

10 Okay. Good.

11 Mr. Gershon, perhaps I -- what I have
12 prior to today was an electronic copy of the General
13 Manager's motion for dismissal, and as best I could
14 tell, there was no physical copy and the electronic copy
15 didn't seem to have all the attachments. It looks like
16 what you've handed me today in this binder is the motion
17 with all the attachments.

18 MR. GERSHON: Correct.

19 JUDGE NEWCHURCH: Okay.

20 MR. GERSHON: Although, I'm surprised to
21 hear that the attachments weren't available
22 electronically. It was my understanding that they were.
23 But you are correct that what you have before you does
24 include those attachments.

25 JUDGE NEWCHURCH: Some of them were there,

1 but I saw references in your brief to exhibits -- that
2 seemed to be in this binder today that were not in the
3 electronic form. I double-checked with Judge
4 Qualtrough. She didn't have a hard copy of the motion
5 with all the exhibits but now I do. Now I have one.

6 MR. GERSHON: Yes.

7 JUDGE NEWCHURCH: Do the other parties
8 have a copy of the General Manager's motion for
9 dismissal and summary disposition with all the
10 attachments? Just making sure everybody has everything.

11 MR. J. MATHEWS: Your Honor, I received
12 mine electronically, and I will be candid with you. I'm
13 not sure I went through and looked at each of the
14 exhibits. For example, he cited to various rules, and I
15 knew what the rules were that he cited to, so I didn't
16 check my electronic copy. I don't know the answer to
17 your question.

18 JUDGE NEWCHURCH: Okay.

19 MR. CAROOM: I'm in that same situation.
20 I did not verify that all of the attachments were in the
21 electronic copy.

22 JUDGE NEWCHURCH: Okay. So they have been
23 filed now and I have them and if the parties want copies
24 of the entire hard copy, then you can make arrangements
25 to get those from Mr. Gershon, I suppose is probably the

1 most efficient way to do that.

2 Okay. So those are sort of my
3 foundational questions, and now I have questions that go
4 beyond that.

5 I see that Section 36 on .1146 talks about
6 the District initiating an amendment to an operating
7 permit, and the District has a rule that I think just
8 repeats that language. I think it's the current
9 Rule 8.9.

10 MR. CAROOM: Your Honor, it does not
11 precisely repeat the language. It's very similar.

12 JUDGE NEWCHURCH: Actually, I'm looking at
13 8.9 of the current rules. It looks like -- it looks
14 like in the current rules maybe it's 8.10.

15 MR. CAROOM: It should be 8.9(e).

16 JUDGE NEWCHURCH: Is that the old rule or
17 the current rule?

18 MR. CAROOM: Current.

19 JUDGE NEWCHURCH: Current rule, 8.9(e). I
20 must be looking in the wrong place.

21 MR. GERSHON: Exhibit GM E6.

22 JUDGE NEWCHURCH: I'm sorry. I'm looking
23 at the wrong set of rules. Excuse me.

24 Okay. Current set of rules District
25 8.9(e).

1 Okay. So it looks like statutorily, the
2 District's authorized to initiate an amendment to the
3 operating permit. And, Mr. Gershon -- well, actually
4 all the parties, does that section of the Water Code,
5 36.1146 allow the District to initiate an amendment to
6 the permit that Bryan currently holds?

7 MR. J. MATHEWS: If the District chose to
8 do so, it could commence a proceeding to do that by
9 giving notice of the intended amendment an opportunity
10 for it.

11 JUDGE NEWCHURCH: Right. But it has
12 authority from the legislature to initiate an amendment
13 process?

14 MR. J. MATHEWS: Yes.

15 JUDGE NEWCHURCH: Okay. Which takes us to
16 the Association. Does any statute or District rule
17 specifically authorize someone like the Association to
18 file a complaint with the District about a permit issued
19 by the District to someone else, like Bryan, and require
20 the District to hear and rule on that complaint? Is
21 there any statutory authorization from the complaint
22 that's been filed?

23 MR. CAROOM: There is not a specific
24 statutory authorization. I think their -- the District
25 has a general responsibility to protect the property

1 rights of people within the district. And the District
2 is responsible to its constituents, Open Meeting, Open
3 Records Act, and I think there's an implied ability of a
4 property owner in the district to petition the District
5 for relief to protect his property rights.

6 What the District does with it is up to
7 the District since there's not a statute governing it.

8 JUDGE NEWCHURCH: Mr. Gershon?

9 MR. GERSHON: Right. Mr. Caroom is
10 correct that there's nothing in the statute that would
11 authorize such a complaint. However, I disagree with
12 his position, and I would cite the 36.1146(a), (b), and
13 (c) which were enacted in 2015, effective September 1st,
14 2015. And that statute recognizes the legislature's
15 vetting of the question of these post-permit-issuance
16 amendments.

17 What the legislature chose to do was to
18 recognize a right of a permit holder to petition the
19 District for amendment in (a) and (b) I believe; and
20 that in (c), the District could sua sponte initiate such
21 an amendment.

22 As we know from the doctrines of statutory
23 construction in construing the statute, clearly the
24 legislature evidenced an interest in providing that
25 opportunity to seek such a proceeding to a permit holder

1 and to the District's -- the District itself but not
2 third parties. The legislature could have included a
3 subsection (d) for third parties, but there is none.

4 That doesn't imply that third parties
5 might ought to be able to seek to amend a permit of a
6 third party.

7 Now, responding to Mr. Caroom's comment
8 about the general interest of a District to protect its
9 constituents' groundwater rights, the General Manager's
10 position is that, yes, the District has a duty to
11 recognize and protect its constituents' property rights.
12 But as 31.101 provides and as the Supreme Court decision
13 in Day/McDaniel provides and as the South Plains Lamesa
14 case, which is another important case involving
15 groundwater district's protection of landowner rights in
16 their groundwater, it's through the rulemaking process
17 that the District protects interests such as those
18 Mr. Fazzino has raised.

19 As we briefed extensively in the General
20 Manager's motions, it's all about the rulemaking.

21 If Mr. Fazzino and the Association that he
22 is a member of desires to see a change in the way that
23 permits are allocated, it's through rulemaking.

24 JUDGE NEWCHURCH: So if there is no
25 statute authorizing a third party to initiate an action

1 to reopen and amend another party's permit, doesn't that
2 mean the Association, Mr. Fazzino, have no standing to
3 bring this action and that the action should be
4 dismissed for that reason?

5 MR. CAROOM: We are not asking to initiate
6 a proceeding to amend the permit.

7 JUDGE NEWCHURCH: Okay.

8 MR. CAROOM: We asking for the District to
9 initiate that proceeding to amend the permit. So we are
10 petitioning the District for relief, and the District
11 may grant that petition if it chooses to do so and
12 initiate the statutorily authorized proceeding. That's
13 what we're requesting. We're not claiming the authority
14 to initiate the proceeding ourselves.

15 JUDGE NEWCHURCH: So there's no basis for
16 this case.

17 MR. CAROOM: I'm sorry.

18 JUDGE NEWCHURCH: There's no basis for
19 this case. You're using "petition" in a looser sense of
20 we would like the District to do something as opposed to
21 we're initiating an action to compel the District.

22 MR. CAROOM: That's correct.

23 JUDGE NEWCHURCH: Okay. So the District
24 is in no way statutorily required to consider your
25 petition through some sort of contested case process.

1 MR. CAROOM: It's not statutorily required
2 to.

3 JUDGE NEWCHURCH: And you're not
4 authorized, your Association, and Mr. Fazzino are not
5 statutorily authorized to compel the District to go
6 through this sort of contested case process.

7 MR. CAROOM: No. This is a discretionary
8 thing we are asking the District to undertake.

9 JUDGE NEWCHURCH: Why shouldn't the case
10 be dismissed? There's no standing to bring -- I'm using
11 "contested case" in a general sense, not in a very
12 specific sense because I know we're not talking a state
13 agency -- although the statute does say you go under the
14 ABA, so I guess it's kind of a contested case, but
15 there's no basis for a contested case. The Association
16 has no statutory authorization to initiate a contested
17 case.

18 MR. CAROOM: We don't have statutory
19 authorization to initiate the contested case. We're
20 petitioning the District for relief because the property
21 rights are being impacted. It's a discretionary relief
22 that the District could grant, that the Board of the
23 District could choose to undertake. The Board has
24 contracted with SOAH to conduct a hearing to develop the
25 facts relative to whether or not it should undertake

1 that.

2 MR. J. MATHEWS: Your Honor, I might
3 clarify the order of the District because here they want
4 you to determine whether there are justiciable issues in
5 this case, and you have put your finger on the heart of
6 the matter. They have no statutory authority to bring
7 the action; therefore, they have no standing. There is
8 no justiciable issue.

9 JUDGE NEWCHURCH: Let's look at General
10 Manager -- you-all don't have this. Mr. Gershon, you
11 do. General Manager's Exhibit D, that's the referral.

12 MR. J. MATHEWS: B as boy?

13 JUDGE NEWCHURCH: Yes -- pardon me -- D as
14 in dog.

15 MR. J. MATHEWS: Okay.

16 JUDGE NEWCHURCH: This is an April 13th,
17 2017 -- it looks like it's the recording -- it's the
18 minutes.

19 MR. GERSHON: Yes, Judge. If the parties
20 have the motion of the footnote 3 in General Manager's
21 motion, it quotes the scope of the referral if that's
22 helpful for you. Page 5 of General Manager's motions,
23 footnote 3.

24 MR. CAROOM: Is that the same as what's on
25 page 13?

1 MR. GERSHON: Yes. An excerpt. The
2 relevant excerpt, yes.

3 JUDGE NEWCHURCH: So reading -- does
4 everybody that have that now?

5 MR. CAROOM: Uh-huh.

6 JUDGE NEWCHURCH: So I'm reading the
7 second full paragraph -- I guess it's not. It's the
8 paragraph right in the middle that begins with "a motion
9 was made." It says, (as read) The hearing examiner,
10 meaning me, should conduct any necessary proceedings to
11 determine if the complaint contains justiciable issues.

12 I think if there's no authority for a
13 complainant to initiate a proceeding, there is no
14 necessary proceeding and there are no justiciable
15 issues.

16 MR. GERSHON: And, Judge, I haven't spoke
17 upon this issue yet, the General Manager agrees with
18 your position and believes that it's bolstered by
19 Chapter 36, Subchapter M, which addresses permitting
20 proceedings. And that subchapter contemplates that if
21 Mr. Fazzino and the Association were interested in the
22 permit, there were adequate remedies for them to
23 participate at other times in other venues. It bolsters
24 where you're at right now with your position. There's a
25 process set up by Chapter 36 for third parties to engage

1 on other's permitting matters but not in the context of
2 the complaint as you've resolved.

3 My only comment, not to distract, but it's
4 to say Subchapter M further bolsters that position.

5 JUDGE NEWCHURCH: So let me read that back
6 to you using language that I'm a little more used to.

7 I think you're saying the Association or
8 Mr. Fazzino or both could have intervened in the prior
9 applications by Bryan before the permit into amendment.

10 MR. J. MATHEWS: Could have.

11 JUDGE NEWCHURCH: But they did not. Is
12 that right?

13 MR. GERSHON: There were multiple
14 proceedings along the way where -- that they could have.

15 JUDGE NEWCHURCH: Right.

16 MR. GERSHON: In fact, Mr. Caroom
17 represented, I believe, one of the clients here today of
18 the Association during one of those proceedings but
19 chose not to appeal the decision.

20 JUDGE NEWCHURCH: Do I need -- does the
21 District even need to get there?

22 MR. GERSHON: No. No.

23 JUDGE NEWCHURCH: There's no necessary
24 proceeding, there is no justiciable issue because
25 there's no statute that gives the Association,

1 Mr. Fazzino, authority to initiate the proceeding, a
2 contested case proceeding. They can petition the
3 Government in a general sense, Dear Government, please
4 do something.

5 MR. CAROOM: And that's what we have done.

6 JUDGE NEWCHURCH: Okay.

7 MR. CAROOM: And there are facts pertinent
8 to whether or not the Board should exercise its
9 discretion to undertake either of these reliefs that we
10 have identified. They could be developed in the case.

11 JUDGE NEWCHURCH: Could be but they could
12 also be developed informally through letter
13 presentations and, you know, requests to speak at
14 District board meetings and all kinds of other informal
15 proceedings.

16 They don't -- there's not a necessity.
17 There's no -- there's no necessity for a judicial
18 proceeding like this one that I can see. Am I missing
19 something?

20 MR. CAROOM: Well, the Board referred the
21 matter to SOAH and asked you to do any other proceedings
22 to make a recommendation for the Board's final action on
23 the complaint.

24 JUDGE NEWCHURCH: Right. So -- so where
25 I'm headed, I think, is there's no necessary proceeding,

1 there's no justiciable issue. Because there's no
2 necessary proceeding or no justiciable issue, there are
3 no effective parties concerning that -- the nonissue;
4 and what other proceedings are necessary to make a final
5 action, the only necessary action is for the Board to
6 dismiss the petition. Something like failure to
7 state -- failure to state a basis -- I'm going to mumble
8 this and get it wrong, failure to state a cause of
9 action. Failure to state a basis for a contested case.

10 MR. CAROOM: Well, there's a -- there's a
11 cause of action upon which relief can be granted.

12 JUDGE NEWCHURCH: Which is?

13 MR. CAROOM: If the Board chooses to grant
14 it. It's the Board that has to undertake either the
15 counsel laid forfeiture of the permit or the amendment
16 of the permit.

17 JUDGE NEWCHURCH: Right. The Board can do
18 those things. The Board doesn't need a contested case
19 hearing to decide whether or not it can do those things
20 or wants to do those things that I can see.

21 MR. J. MATHEWS: It hasn't done those
22 things.

23 JUDGE NEWCHURCH: So the General
24 Manager -- and I'm sorry. I'm borrowing from state
25 agency practice. I understand and I'm thinking that I

1 read that the General Manager may initiate the process
2 to have an amendment.

3 MR. CAROOM: Yes.

4 JUDGE NEWCHURCH: And that's --

5 MR. GERSHON: It's District initiated, so
6 it could contemplate the General Manager.

7 JUDGE NEWCHURCH: Okay.

8 MR. CAROOM: I think the Board would have
9 to approve it.

10 JUDGE NEWCHURCH: Right.

11 MR. CAROOM: At least --

12 MR. GERSHON: The General Manager --

13 MR. CAROOM: -- the one proceeding --

14 MR. GERSHON: -- as --

15 MR. CAROOM: -- one proceeding I've been
16 involved in the District where that was undertaken for
17 it.

18 MR. GERSHON: As a matter of practice, I
19 believe that is how the General Manager would handle it,
20 go to the Board to ask about it. But the rules says the
21 District initiated, that the General Manager with the
22 District to a point. And the General Manager has not
23 initiated it.

24 JUDGE NEWCHURCH: I don't need to get to
25 this, but I'm going to ask anyway. Mr. Caroom, at one

1 point you referred to this as a test case, and I'm
2 wondering perhaps whether the Association and
3 Mr. Fazzino are trying to exhaust any possible
4 administrative remedy they might have so that they may
5 then proceed to the judicial branch?

6 MR. CAROOM: That is one of the purposes
7 of this proceeding.

8 JUDGE NEWCHURCH: Okay. So I don't think
9 I'm hearing anything to contradict what I contemplated,
10 which is to dismiss the proceeding because the
11 Association and Mr. Fazzino have no authority, no
12 standing to bring in and have resolution of a contested
13 case on its petition, and then the Board -- the District
14 and the General Manager may -- may informally decide,
15 yeah, we want to do something about this but that's
16 entirely outside of a contested case process.

17 Okay. So I'll be writing a proposal for
18 the decision to that effect. I think it's going to be
19 relatively short. You've got several other things going
20 on. I don't know exactly when it will be issued but
21 certainly within sixty days and probably a lot less.

22 Is there anything else that we need to
23 talk about today?

24 MR. GERSHON: No, Your Honor.

25 JUDGE NEWCHURCH: And we are adjourned.

1 Thank you-all.

2 MR. GERSHON: Thank you, Judge.

3 (Exhibit GM No. 1 marked)

4 (Proceedings concluded at 9:41 a.m.)

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STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Autumn J. Smith, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the above-mentioned matter occurred as hereinbefore set out.

I FURTHER CERTIFY THAT the proceedings of such were reported by me or under my supervision, later reduced to typewritten form under my supervision and control and that the foregoing pages are a full, true, and correct transcription of the original notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 26th day of October 2017.



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State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

December 19, 2017

Monique Norman
Attorney at Law
P.O. Box 50245
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VIA FACSIMILE – 512/459-8671

**RE: Docket No. 960-17-4513; IN THE MATTER OF THE COMPLAINT
OF THE BRAZOS VALLEY GROUNDWATER RIGHTS
ASSOCIATION AND TONY FAZZINO AGAINST THE CITY OF
BRYAN**

Dear Ms. Norman:

These are my recommendations concerning the exceptions to the Proposal for Decision (PFD). I recommend that the exceptions of Brazos Valley Groundwater Rights Association and Tony Fazzino be overruled. The City of Bryan's exception to Conclusion of Law (COL) 17 should be sustained. The General Manager's exceptions to COL 12 and Finding of Fact (FOF) 19 should be sustained and FOF 19 should be struck. Also I recommend adding the two FOFs that begin "On August 3, 2006," and "On April 11, 2013," as set out on page 6 of the General Manager's exceptions. The other exceptions should be overruled. Because I assume the Board will not adopt the narrative text of the PFD, changes to it are not necessary.

Sincerely,

William G. Newchurch
Administrative Law Judge

WGN/dk

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STYLE/CASE: CITY OF BRYAN WELL NO. 18 AND BV-DO-003

SOAH DOCKET NUMBER: 960-17-4513

REFERRING AGENCY CASE:

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

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State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

November 14, 2017

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VIA REGULAR MAIL

**RE: Docket No. 960-17-4513; IN THE MATTER OF THE COMPLAINT
OF THE BRAZOS VALLEY GROUNDWATER RIGHTS
ASSOCIATION AND TONY FAZZINO AGAINST THE CITY OF
BRYAN**

Dear Ms. Norman:

Please find enclosed a Proposal for Decision on Summary Disposition in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.texas.gov.

Sincerely,

A handwritten signature in cursive script that reads "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN/et

xc: Troupe Brewer, Lloyd Gosselink, 816 congress Ave., Suite 1900, Austin, TX 78701 – **VIA REGULAR MAIL**
Michael Gershon, Attorney at Law, Lloyd Gosselink, 816 Congress Ave., Ste. 1900, Austin, TX 78701– **VIA REGULAR MAIL**
Doug Caroom, Bickerstaff Heath Delgado Acosta, LLP, 3711 S. Mopac Expressway, Building One, Ste. 300, Austin, TX. 78746 – **VIA REGULAR MAIL**
Jim Mathews, Attorney at Law, Mathews & Freeland, LLP, 8140 N. Mopac, Ste. 260, Austin, TX 78759 – **VIA REGULAR MAIL**
Brazos Valley Groundwater Conservation District Board of Directors, 112 W. 3rd Street, Hearne, TX 77859 – **VIA REGULAR MAIL**

300 W. 15th Street, Suite 504, Austin, Texas 78701/P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.475.4994 (Fax)
www.soah.texas.gov

SOAH DOCKET NO. 960-17-4513

**IN THE MATTER OF THE COMPLAINT § BEFORE THE STATE OFFICE
OF THE BRAZOS VALLEY §
GROUNDWATER RIGHTS § OF
ASSOCIATION AND TONY FAZZINO §
AGAINST THE CITY OF BRYAN § ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION ON SUMMARY DISPOSITION

The Brazos Valley Groundwater Rights Association (the Association) and one of its members, Tony Fazzino (collectively, the Complainants), filed a complaint (the Complaint) with the Brazos Valley Groundwater Conservation District (the District) concerning permit BV-DO-0003 (the Permit) that the District issued to the City of Bryan (the City) for the City's Well No. 18 (Well 18).¹ The Complainants claimed they owned property within the District and asked the District to hold a hearing, find the City included false information in its application for the Permit, and revoke the Permit. Alternatively, the Complainants asked the District to initiate proceedings to involuntarily amend the Permit to limit the City's production of water from Well 18.

The Complainants, the City, and the District's general manager (the GM) filed motions for summary disposition. The City and the GM also filed motions to dismiss the Complaint.

The Administrative Law Judge (ALJ) concludes that the City's motion for summary disposition and dismissal of the Complaint should be granted in part and the Complaint should be dismissed with prejudice to refile. No material fact is in dispute, no statute or rule authorizes the Complainants to file a complaint to initiate an inquiry into or an amendment of the City's Permit, the Complaint fails to state a claim for which the District can grant relief, and the District had no subject matter jurisdiction to consider the complaint. The remaining motions for summary disposition should be denied because they are moot.

¹ Brazos Valley Groundwater Conservation District General Manager's Motions, Responses and Authorities (Oct. 19, 2017) (GM's MSD), Ex. GM-F.

I. PROCEDURAL HISTORY

The District issued the Permit to the City on February 20, 2007.² Almost ten years later, on January 30, 2017, the Complainants filed the Complaint with the District.³ The City filed its Response to the Complaint on February 3, 2017,⁴ an objection to the District's Notice of Public Permit Hearing on the Complaint on March 1, 2017,⁵ and a Supplemental Response on April 10, 2017,⁶ all of which requested that the District dismiss the Complaint.

On April 13, 2017, the District's Board of Directors (the Board), at a meeting and hearing, referred the Complaint to either a hearings examiner or, if requested by the Complainants or the City, the State Office of Administrative Hearings (SOAH) to "conduct any necessary proceeding to determine if the complaint contains justiciable issues authorized under Chapter 36 of the Texas Water Code and the District's rules, if there are any affected parties, and any other proceedings to make a recommendation to the Board for its final action on the [C]omplaint."⁷

On April 14, 2017, the Complainants requested that the Complaint be referred to SOAH for hearing.⁸ On June 8, 2017, the District referred the Complaint to SOAH for hearing.⁹

² City of Bryan's Motion for Summary Disposition, Plea to the Jurisdiction, and Motion to Dismiss (Sep. 7, 2017) (City's MSD) at Ex. 8.

³ GM's MSD, Ex. GM-F. The Complainants later filed a first amended complaint on August 15, 2017, that alleged that Mr. Fazzino's siblings also owned property within the District. GM's MSD, Ex. GM-G. Mr. Fazzino's siblings did not separately complain, presumably because they are members of the Association. Technically, the Board has not referred the amended complaint to SOAH. The amended complaint does not affect the basis on which the ALJ recommends summary disposition.

⁴ GM's MSD, Ex. GM-E7.

⁵ GM's MSD, Ex. GM-E8.

⁶ GM's MSD, Ex. GM-E9.

⁷ GM's MSD, Ex. GM-D.

⁸ GM's MSD, Ex. GM-E10.

⁹ Officially noticed.

On July 11, and August 7, 2017, after required public notices were given,¹⁰ a SOAH ALJ¹¹ held prehearing conferences that the Complainants, the GM, and the City attended though counsel.¹² The parties agreed that an initial phase of the hearing should be conducted to consider jurisdiction over, summary decision of, and dismissal of the Complaint.¹³ The ALJ issued an order setting a schedule for those activities,¹⁴ which was later modified as follows:¹⁵

DATE	EVENT
July 13, 2017	Discovery begins on issues regarding jurisdictional/summary disposition issues
September 7, 2017	Deadline to file jurisdictional challenges, motions for summary disposition, or motions to dismiss
October 6, 2017	Deadline to file responses to jurisdictional challenges, motions for summary disposition, or motions to dismiss
October 13, 2017	Deadline to file replies to responses to jurisdictional challenges, motions for summary disposition, or motions to dismiss
October 19, 2017	Hearing on jurisdictional challenges, motions for summary disposition, or motions to dismiss

On September 7, 2017, (1) the City filed a motion for summary disposition, a plea to the jurisdiction, and a motion to dismiss the Complaint;¹⁶ (2) the GM filed a motion for dismissal and a motion for summary disposition;¹⁷ and (3) the Complainants filed a motion for summary disposition of the Complaint.¹⁸ On October 6, 2017, each of them filed responses to the others' motions, and on October 13, 2017, the City and the Complainants filed replies.

¹⁰ Exs. GM-A, GM-B.

¹¹ This case was originally assigned to ALJ Kerrie Jo Qualtrough, but later reassigned to ALJ William G. Newchurch to better balance ALJ workload at SOAH.

¹² Transcript (Tr.) of Jul. 11, 2017; Tr. of Aug. 7, 2017.

¹³ Tr. of Jul. 11, 2017 at 13-25.

¹⁴ Order No. 3.

¹⁵ Order Nos. 4-5.

¹⁶ City's MSD.

¹⁷ On October 19, 2019, the GM substituted, without objection, his MSD of that date for his motions of Sep. 7, 2017.

¹⁸ Brazos Valley Groundwater Rights Association's Motion for Summary Disposition (Sep. 7, 2017) (Complainants' MSD).

On October 19, 2017, the ALJ held a prehearing conference on the motions for summary disposition and dismissal, asked questions, and considered arguments. At the hearing, the GM offered a substitute of his motions for summary disposition and dismissal, which contained many attachments and was admitted without objection.¹⁹ The ALJ announced that he had concluded that summary disposition should be granted and the Complaint should be dismissed and he would soon issue a Proposal for Decision recommending that to the Board. The ALJ closed the record on October 19, 2017.

II. APPLICABLE LAW

The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution.²⁰ Chapter 8835 of the Texas Special District Local Laws Code (Chapter 8835) governs the District.²¹ Except as provided by Chapter 8835, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code (Chapter 36), applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution.²² The Board may and must adopt and enforce rules to implement Chapter 36 of the Texas Water Code, including rules governing procedure before the board.²³ The Board has adopted rules that took effect on August 10, 2017.²⁴ When both the Permit was issued, on February 20, 2007, and the Complaint was filed, on January 30, 2017, the District had a different set of rules in effect.²⁵

¹⁹ GM's MSD.

²⁰ Tex. Spec. Dist. Code § 8835.002.

²¹ Tex. Spec. Dist. Code ch. 8835. This is found at GM's MSD, Authorities.

²² Tex. Spec. Dist. Code § 8835.101. Tex. Water Code ch. 36 is found at GM's MSD, Authorities.

²³ Tex. Water Code § 36.101(a), (b).

²⁴ Rules of the Brazos Valley Groundwater Conservation District (eff. Aug. 10, 2017). These are found at GM's MSD, Ex. GM-E6.

²⁵ Rules of the Brazos Valley Groundwater Conservation District (eff. Nov. 3, 2005). These are found at GM's MSD, Ex. GM-E5.

A groundwater conservation district must contract with SOAH to conduct the hearing if requested by a party to a contested case.²⁶ If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code.²⁷ The district may adopt rules for a hearing conducted under this section that are consistent with SOAH's procedural rules.²⁸ The contract between the District and SOAH for this case specifies that SOAH's procedural rules shall apply in this case.²⁹

Chapter 36, Chapter 8835, and the District's rules do not include provisions for summary disposition or dismissal of a case. However, SOAH's procedural rules do. A SOAH ALJ may dismiss a case or a portion of the case from SOAH's docket for lack of jurisdiction over the matter by the referring agency, mootness of the case, or failure to state a claim for which relief can be granted.³⁰

Also, a SOAH rule provides for summary disposition of a case:

Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion.³¹

Summary disposition evidence may include deposition transcripts; interrogatory answers and other discovery responses; pleadings; admissions; affidavits; materials obtained by discovery; matters officially noticed; stipulations; authenticated or certified public, business, or

²⁶ Tex. Water Code § 36.416(b).

²⁷ Tex. Water Code § 36.416(a).

²⁸ Tex. Water Code § 36.416(a).

²⁹ Officially noticed at Tr. of Oct. 19, 2017, at 16.

³⁰ 1 Tex. Admin. Code § 155.503(b)(1)(A), (C)-(D).

³¹ 1 Tex. Admin. Code § 155.505(a).

medical records; and other admissible evidence.³² All summary disposition evidence offered in support of or in opposition to a motion for summary disposition shall be filed with the motion or response.³³

III. EVIDENCE

For purposes of ruling on the motions for summary disposition, the ALJ considers the evidence admitted at the prehearing conferences held by the ALJs, the exhibits attached to the parties' MSDs, and the facts officially noticed by the ALJ.³⁴

IV. SUMMARY DISPOSITION AND DISMISSAL

Among other reasons, the City argues that summary disposition should be granted and the Complaint should be dismissed because "no statute or rule authorizes the filing of a complaint to compel the District to initiate such involuntary amendment proceeding"; hence, the District lacks jurisdiction.³⁵ The GM agrees with the City,³⁶ but the District does not.³⁷ The ALJ agrees with the City and finds its motion should be granted in part and the case should be dismissed.

Like all groundwater conservation districts, the District only has the rights, privileges, and functions conferred by law.³⁸ No provision of law authorizes someone other than the District to file a complaint with the District to challenge the legality of someone else's permit or to seek revocation or amendment of it. Even the Complainants agree that is true.³⁹ Moreover, no statute authorizes the District to rule on such a complaint if one is filed.

³² 1 Tex. Admin. Code § 155.505(e)(1).

³³ 1 Tex. Admin. Code § 155.505(e)(3).

³⁴ By separate document, the ALJ is certifying the record and forwarding it to the District.

³⁵ City's MSD at 7-9.

³⁶ Tr. of Oct. 19, 2017, at 23-24, 27.

³⁷ Tr. of Oct. 19, 2017, at 23-26, 28-30.

³⁸ Tex. Const. art. XVI, § 59(b).

³⁹ Tr. of Oct. 19, 2017, at 21-24.

It is true that Texas Water Code § 36.1146(a) authorizes a permit holder to request a district to amend the holder's own operating permit. Also, Texas Water Code § 36.1146(c) authorizes a district to initiate an amendment to an operating permit in accordance with the District's rules, and District rule 8.9(e) provides that the District may initiate permit amendments for certain reasons. However, those statutes and rule are not applicable to this case that was not initiated by the City, the District, or the GM on behalf of the District. Instead, this case concerns the Complaint filed by the Complainants.

Nevertheless, the Complainants cite the provisions authorizing the District to initiate a permit amendment and argue that the Board referred this case to SOAH for a recommendation on whether the District should initiate such an amendment.⁴⁰ In fact, nothing in the Board's referral asks the ALJ to recommend whether the District should initiate an amendment of the City's Permit. Instead, the Board asked the ALJ to "conduct any necessary proceeding to determine . . . if the complaint contains justiciable issues authorized under Chapter 36 of the Texas Water Code and the District's rules."⁴¹

For the judicial branch, "the constitutional roots of justiciability doctrines such as ripeness, as well as standing and mootness, lie in the prohibition on advisory opinions, which in turn stems from the separation of powers."⁴² The Supreme Court of Texas has construed the separation of powers article in the Texas Constitution "to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department."⁴³

In short, the courts will not exercise power not delegated to them by law and issue advisory opinions. Applying that principle by analogy, nothing in Chapter 8835, Chapter 36, or any other cited law authorizes the District to issue an advisory opinion, a recommendation like the Complainants seek in this case.

⁴⁰ Tr. of Oct. 19, 2017, at 25-26, 29-30.

⁴¹ GM's MSD, Ex. GM-D.

⁴² *Patterson v. Planned Parenthood of Houston & Se. Texas, Inc.*, 971 S.W.2d 439, 442 (Tex. 1998); see Tex. Const. art. II, § 1 (separation of powers).

⁴³ *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

The ALJ finds that no material fact is in dispute, the District has no subject matter jurisdiction to rule on the Complaint, the Complainants have failed to state a claim for which relief can be granted, summary disposition should be granted, and the Complaint should be dismissed.⁴⁴ Because the Complaint should be dismissed on these grounds, the other motions for summary disposition urged by the parties are moot and should be denied for that reason.⁴⁵

V. FINDINGS OF FACT

1. On February 20, 2007, the Brazos Valley Groundwater Conservation District (the District) issued permit BV-DO-0003 (the Permit) to the City of Bryan (the City) for the City's Well No. 18 (Well 18).
2. On January 30, 2017, the Brazos Valley Groundwater Rights Association and one of its members, Tony Fazzino (collectively, the Complainants), filed a complaint (the Complaint) with the District, alleged that they owned property in the District, and asked the District to hold a hearing, find the City included false information in its application for the Permit, and revoke the Permit.
3. In the Complaint, the Complainants alternatively asked that the District initiate proceedings to involuntarily amend the Permit to limit the City's production of water from Well 18.
4. The City filed its Response to the Complaint on February 3, 2017, an objection to the District's Notice of Public Permit Hearing on the Complaint on March 1, 2017, and a Supplemental Response on April 10, 2017, all of which requested that the District dismiss the Complaint.
5. On April 13, 2017, the District's Board of Directors (the Board), at a meeting and hearing, referred the Complaint to either a hearings examiner or, if requested by the Complainants or the City, the State Office of Administrative Hearings (SOAH) to "conduct any necessary proceeding to determine if the complaint contains justiciable issues authorized under Chapter 36 of the Texas Water Code and the District's rules, if there are any affected parties, and any other proceedings to make a recommendation to the Board for its final action on the [C]omplaint."
6. On April 14, 2017, the Complainants requested that the Complaint be referred to SOAH for hearing.

⁴⁴ 1 Tex. Admin. Code §§ 155.503(b)(1)(A), (D), .505(a).

⁴⁵ 1 Tex. Admin. Code §§ 155.503(b)(1)(C), .505(a).

7. On June 8, 2017, the District referred the Complaint to SOAH for hearing.
8. The contract between the District and SOAH for this case specifies that SOAH's procedural rules shall apply in this case.
9. On June 26, 2017, the District mailed to the Complainants and the City a notice of preliminary hearing on the Complaint on July 11, 2017, before SOAH.
10. On July 11, 2017, a SOAH Administrative Law Judge (ALJ) held a prehearing conference that the Complainants, the District's General Manager (the GM), and the City attended through counsel. No one else appeared or sought intervention.
11. On July 25, 2017, the District mailed to the Complainants, the City, and the Clerk of Brazos County, for posting, a notice of preliminary hearing on the Complaint on August 7, 2017, before SOAH.
12. On August 7, 2017, a SOAH ALJ held a prehearing conference that the Complainants, the GM, and the City attended through counsel. No one else appeared or sought intervention.
13. The notices of hearing contained statement of the time, place, and nature of the hearing, and a short, plain statement of the factual matters asserted.
14. On August 15, 2017, the Complainants filed a first amended complaint that alleged that Mr. Fazinno's siblings also owned property within the District. None of his siblings separately complained or sought intervention.
15. On September 7, 2017, (1) the City filed a motion for summary disposition, a plea to the jurisdiction, and a motion to dismiss the Complaint; (2) the GM filed a motion for dismissal and a motion for summary disposition; and (3) the Complainants filed a motion for summary disposition of the Complaint.
16. Among other reasons, the City argues that summary disposition should be granted and the Complaint should be dismissed because no statute or rule authorizes the filing of a complaint to compel the District to initiate involuntary amendment proceeding; hence, the District lacks jurisdiction.
17. On October 6, 2017, the City, the GM, and the Complainants filed responses to each other's motions, and on October 13, 2017, the City and the Complainants filed replies.
18. On October 19, 2017, the ALJ held a prehearing conference on the motions for summary disposition and dismissal, and the Complainants, the City, and the GM attended through counsel.
19. At the hearing, the GM offered a substitute of his motions for summary disposition and dismissal, which contained many attachments and was admitted without objection.

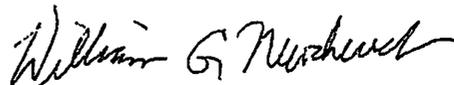
20. The ALJ closed the record on October 19, 2017.

VI. CONCLUSIONS OF LAW

1. The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution. Tex. Spec. Dist. Code § 8835.002.
2. If requested by a party to a contested case, a groundwater conservation district must contract with SOAH to conduct the hearing. Tex. Water Code § 36.416(b).
3. SOAH has jurisdiction to conduct a hearing and prepare a proposal for decision in this case.
4. If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code. Tex. Water Code § 36.416(a).
5. The notices of the preliminary hearings by the ALJs comply with Texas Government Code §§ 2001.051 and 2001.052(a)(1) and (4).
6. The District only has the rights, privileges, and functions conferred by law. Tex. Const. art. XVI, § 59(b).
7. Chapter 8835 of the Texas Special District Local Laws Code (Chapter 8835) governs the district. Tex. Spec. Dist. Code ch. 8835.
8. Except as provided by Chapter 8835, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code (Chapter 36), applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution. Tex. Spec. Dist. Code § 8835.101.
9. No provision of law authorizes someone other than the District to file a complaint with the District to challenge the legality of someone else's permit or to seek revocation or amendment of it. Moreover, no statute authorizes the District to rule on such a complaint if one is filed.
10. The Board must adopt and enforce rules to implement chapter 36 of the Texas Water Code, including rules governing procedure before the Board. Tex. Water Code § 36.101(b).
11. The Board has adopted rules that took effect on August 10, 2017. Rules of the Brazos Valley Groundwater Conservation District (eff. Aug. 10, 2017).

12. When both the Permit was issued, on February 20, 2007, and the Complaint was filed, on January 30, 2017, the District had a different set of rules in effect. Rules of the Brazos Valley Groundwater Conservation District (eff. Nov. 3, 2005).
13. Chapter 36, Chapter 8835, and the District's rules do not include provisions for summary disposition or dismissal of a case; however, SOAH's procedural rules do.
14. The District may adopt rules for a hearing conducted under this section that are consistent with SOAH's procedural rules. Tex. Water Code § 36.416(a).
15. A SOAH ALJ may dismiss a case or a portion of the case from SOAH's docket for lack of jurisdiction over the matter by the referring agency, mootness of the case, or failure to state a claim for which relief can be granted. 1 Tex. Admin. Code § 155.503(b)(1)(A), (C)-(D).
16. Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. 1 Tex. Admin. Code § 155.505(a).
17. No material fact is in dispute, the District has no subject matter jurisdiction to rule on the Complaint, the Complaints have failed to state a claim for which relief can be granted, the City's motion for summary disposition should be granted in part, and the Complaint should be dismissed. 1 Texas Administrative Code §§ 155.503(b)(1)(A), (D), .505(a).
18. Because the Complaint should be dismissed on the above grounds, the other motions for summary disposition are moot and should be denied. 1 Texas Administrative Code §§ 155.503(b)(1)(C), .505(a).

SIGNED November 14, 2017.



**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

ATTACHMENT 4

RECEIVED
2/14/2017

District Use Only

Permit No. _____

BVGCD Well No. _____



Brazos Valley Groundwater Conservation District

P.O. Box 528
Hearne, TX 77859
Ph: 979-279-9350 Fax: 979-279-0035
E-mail: clopez@brazosvalleygcd.org Website: www.brazosvalleygcd.org

APPLICATION FOR DRILLING OR OPERATING PERMIT

One (1) Year _____ Five (5) year X

A \$100 fee is due upon submittal of this application for each well requested.

1. Applicant(s) Information:

- (a) If the applicant is more than one individual or entity with different residences, attach a written affidavit executed by each individual and/or entity with an interest or their legal representatives describing their respective interests in the well(s), listing their names and addresses, and designating a contact person.
- (b) If the applicant is a corporation, partnership, retail water supplier or other business association, state its name and address below and attach written documentation that the contact person is authorized to represent the applicant.

Note: If the applicant is different from the owner of the land on which the well(s) is/are to be located, provide documentation from the property owner granting applicable authority for the applicant to drill and/or operate the well.

Name of Applicant: Anthony Fazzino

Email Address: TJFazzino@verizon.net

Mailing Address: P.O. Box 4694 Bryan, TX 77805-4694

Phone: 979-778-9071 Fax: _____

Contact Person (if different from applicant): Marvin W. Jones

Phone: 806-468-3300 Fax: 806-373-3454

Relationship to Applicant: Attorney

Mailing Address: P.O. Box 15008, Amarillo, TX 79105

2. Amount of Water Requested to be produced under This Permit:

(a) Provide the amount of water requested for each well in acre-feet/year.

Production 4,500 acre-feet/year 3000 gpm
Production 4,500 acre-feet/year 3000 gpm
Production 4,500 acre-feet/year 3000 gpm
Production 4,500 acre-feet/year 3000 gpm

*Please attach additional sheets as needed

(b) State the nature and purpose of beneficial use of the groundwater under the requested permit and provide any evidence (if available).

Agricultural, municipal, manufacturing, industrial, commercial or other beneficial use as defined under Texas Water Code Section 36.001(9)

(c) Estimated Date/Year Drilled: 2017-2020

Drilling Company: To be determined Phone: _____
Address: _____ City: _____
State: _____ Zip code: _____

(d) Identify the aquifer(s) from which the well(s) in this application will produce:

Simsboro: X, Carrizo: _____, Calvert Bluff: _____,
Hooper: _____, Gulf Coast: _____, Queen City: _____,
Sparta: _____, Yegua: _____, Brazos River Alluvium: _____

(e) Well Information: To be determined

Total Depth: _____ Ft. Depth to First Screen: _____ Ft.
Inside Diameter of Casing: _____ In. Pump Size: _____ hp

(f) If the place of use of the groundwater is outside the district's boundaries, please indicate here with an "X": To be determined

(g) Well Location:

Well Site Physical Address: 3008 W. OSR
City: Bryan State: TX Zip: 77807
County: Brazos
Latitude: 30.721905 Longitude: 96.477401
Survey Name* Thomas Henry Survey No*: A-128
Abstract No*: A012800
Section*: _____ Block*: _____

*Asterisk indicates "if known"

3. Attachments to Application

(a) For all wells drilled in the Simsboro Formation, provide the landowners name, contact information, and documentation showing clear legal authority, signed by the landowner of the real estate within the required contiguous acreage (per district Rule 7.1(c)), allowing water production from the requested well.

(b) Water Conservation Plan (Please check one):

I have attached a water conservation plan showing what conservation measures I have adopted or will adopt what conservation goals I have established, and what measures and time frames are necessary to achieve my established water conservation goals.

OR

I declare that I will comply with the District's management plan.

(c) Drought Contingency Plan (Please check one):

I have attached a drought contingency plan showing what drought conservation measures I have adopted or will adopt, what drought conservation goals I have established, and what measures and time frames are necessary to achieve my established drought contingency goals.

OR

I declare that I will comply with the District's drought contingency plan.

(d) Well Closure Plan (Please check one):

I have attached a well closure plan.

OR

I declare that I will comply with the District's well plugging guidelines and report well closure to the District.

I agree that any water withdrawn under the authority of a permit issued based upon the District's grant of this application will be put to beneficial, non-wasteful use at all times, and will not exceed the production allowance of the permit. I agree that reasonable diligence will be used to protect groundwater quality.

I agree to abide by the terms of the District Rules, the District Management Plan, and orders of the Board of Directors, as required by State law. My certification of this application does not waive my right to protest in the future proposed District actions, including proposed amendments to District Rules. However, once the District adopts Rules, Management Plans, Permits, etc., I agree to abide by those terms, as required by State law.

I hereby certify that the information contained herein is true and correct to the best of my knowledge and belief.

Signature of Applicant: 

Date: 14 Feb 2017

Application Revised 8-15-14

<u>District Use Only</u>	
Date received	<u>2-14-17</u>
Permit No.	_____
BVGCD Well No.	_____
Hearing date	_____
Action	_____
Comments/notes:	_____

ADDITIONAL SHEET ATTACHED TO APPLICATION OF ANTHONY FAZZINO

NOTE: Applicant is applying for that amount of groundwater production that will enable him to offset the production from the City of Bryan's Well No. 18 and to give Applicant a fair opportunity to produce his fair share of the groundwater in the reservoir. Given the production permit granted to the City of Bryan for Well No. 18, Applicant believes the amount necessary to allow him a fair opportunity to produce a fair share of such groundwater is approximately 40,000 acre-feet per year.

2. Amount of Water Requested to be produced under this Permit:

(a) Provide the amount of water requested for each well in acre-feet/year.

Production: 4,500 acre-feet/year 3000 gpm

Bank of America

Anthony J Fazzino
Patricia Voelter Fazzino
Po Box 4694
Bryan, TX 77805-4694
979-778-9071

1569
40-4/1011 KS
1030

14 Feb 2017 Date

Pay Brazos Valley Groundwater Conservation Dist \$ 900.00
to the order of Nine hundred and 00/100 Dollars

Bank of America



ACH/BIT 101100045

Memo Well Permit

Anthony J Fazzino

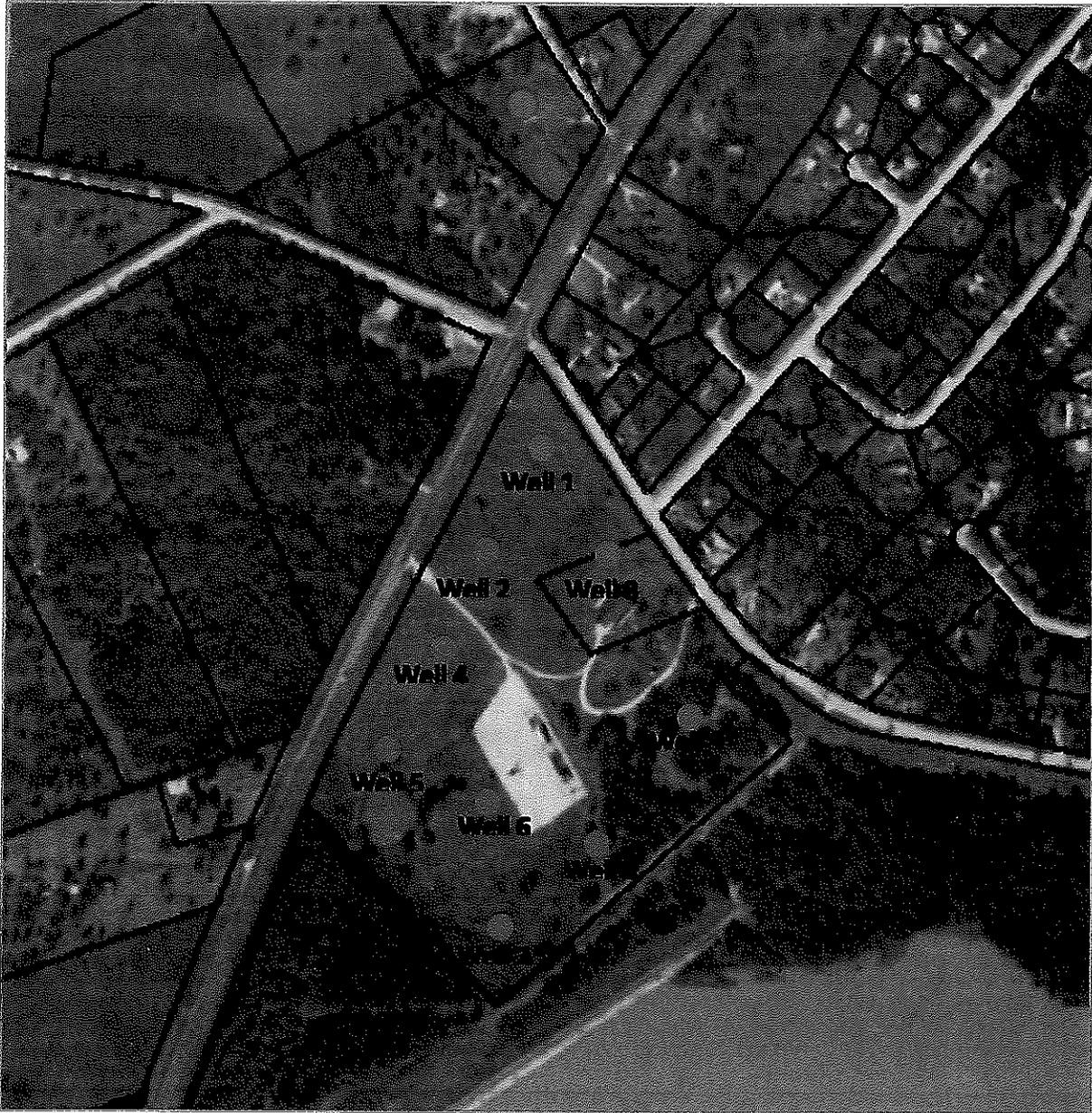
⑆101100045⑆ 331010163125⑆1569

MP

cash
2-14-2017

Halifax Clerk

Fazzino Well Field



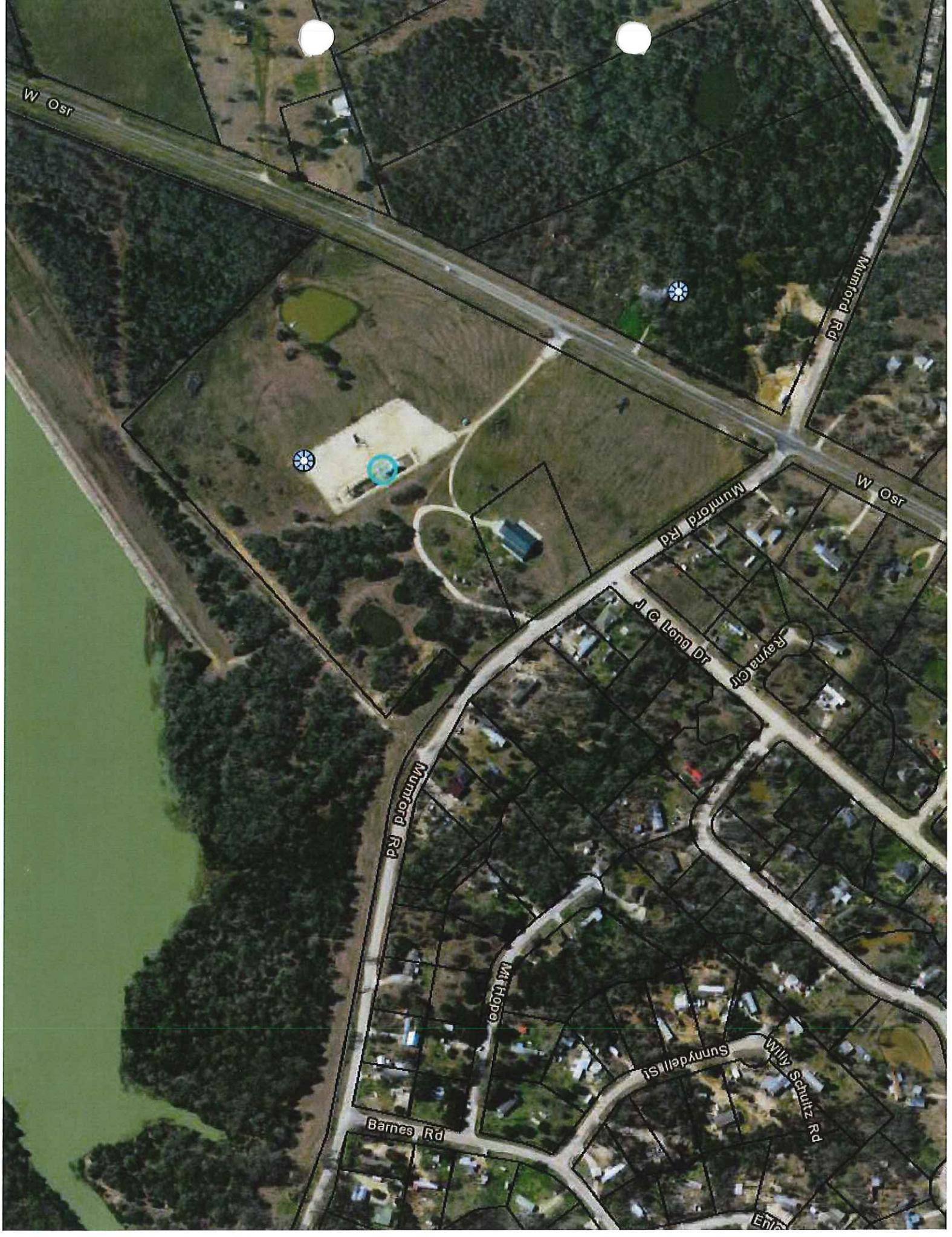
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Well 2	Long: -96.477905	Lat: 30.723392
Well 3	Long: -96.476832	Lat: 30.723364
Well 4	Long: -96.478291	Lat: 30.722626
Well 5	Long: -96.478796	Lat: 30.721851
Well 6	Long: -96.477894	Lat: 30.721445
Well 7	Long: -96.477776	Lat: 30.720477
Well 8	Long: -96.476907	Lat: 30.721141
Well 9	Long: -96.476060	Lat: 30.722110

Brazos CAD Parcels

XREF_ID	012800-0001-0010
PROP_ID1	349690
PROP_ID	R349690
geo_id	012800-0001-0010
situs_num	
situs_stre	
situs_st_1	MUMFORD
situs_st_2	RD
situs_unit	
legal_desc	A012800, THOMAS HENRY A-128, TRACT 1.1, 2. ACRES

[Zoom to](#)





W Osr

Mumford Rd

Mumford Rd

W Osr

J. C. Long Dr

Rayna Ct

Mumford Rd

Mt Hope

Sunnydell St

Wm. Schuitz Rd

Barnes Rd

Ente

DISCLAIMER Information provided for research purposes only. Legal descriptions and acreage amounts are for appraisal district use only and should be verified prior to using for legal purpose and or documents. Please contact the Appraisal District to verify all information for accuracy.

Property Taxing Jurisdiction

Entity	Description	Tax Rate	Market Value	Taxable Value	Estimated Tax	Freeze Ceiling
CAD	APPRAISAL DISTRICT	N/A	N/A	N/A	N/A	N/A
F4	EMG SVCS DIST #4	N/A	N/A	N/A	N/A	N/A
G1	BRAZOS COUNTY	N/A	N/A	N/A	N/A	N/A
S1	BRYAN ISD	N/A	N/A	N/A	N/A	N/A
ZRFND	Z REFUND ENTITY	N/A	N/A	N/A	N/A	N/A

Total Tax Rate: N/A Estimated Taxes With Exemptions: N/A Estimated Taxes Without Exemptions: N/A

Property Improvement - Building

Type: RESIDENTIAL State Code: E1 Living Area: 872.00sqft Value: N/A

Type	Description	Class CD	Year Built	SQFT
MA	MAIN AREA	RF1	1970	872.00
OP	OPEN PORCH	RF1	1970	14.00

Type: RESIDENTIAL State Code: E1 Living Area: 0.00sqft Value: N/A

Property Land

Type	Description	Acre	Sqft	Eff Front	Eff Depth	Market Value	Prod. Value
1	HOMESITE	26.65	1,160,874.00	0.00	0.00	N/A	N/A

Property Roll Value History

Year	Improvements	Land Market	Ag Valuation	Appraised	HS Cap	Assessed
2017	N/A	N/A	N/A	N/A	N/A	N/A
2016	\$26,230	\$158,950	\$0	\$185,180	\$0	\$185,180
2015	\$25,000	\$158,950	\$0	\$183,950	\$0	\$183,950
2014	\$24,140	\$194,600	\$0	\$218,740	\$0	\$218,740
2013	\$24,600	\$144,110	\$0	\$168,710	\$0	\$168,710
2012	\$22,460	\$144,110	\$0	\$166,570	\$0	\$166,570
2011	\$22,880	\$156,560	\$0	\$179,440	\$0	\$179,440
2010	\$7,620	\$156,560	\$0	\$164,180	\$0	\$164,180
2009	\$96,660	\$127,190	\$0	\$223,850	\$0	\$223,850

Property Deed History

Deed Date	Type	Description	Grantor	Grantee	Volume	Page	Number
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5/24/1994	Conv	CONVERSION	FAZZINO JOHN A	FAZZINO ROSALIE	2116	225	
3/18/1968	Conv	CONVERSION	UNKNOWN SELLER	FAZZINO JOHN A	268	558	

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BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT

P.O. Box 528 · HEARNE, TX 77859 · (979)279-9350 · FAX: (979)279-0035
WWW.BRAZOSVALLEYGCD.ORG

February 28, 2017

Mr. Anthony Fazzino
c/o Marvin W. Jones
P.O. Box 15008
Amarillo, Texas 79105

Re: Drilling/Operating Permit Application

Dear Mr. Fazzino,

Having received a Drilling/Operating permit application from you on February 14, 2017, I have now reviewed the application and am in need of further information in order to declare it administratively complete. Below is the additional information I need.

- Rule 8.4 (b)(5) – “except for exempt wells and operating permits for Existing wells based on historic use, availability of feasible and practicable alternative supplies to the applicant”.

Please provide any alternative supplies that may be available to you.

- Rule 8.4 (b)(6)(B) – “in the case of wells capable of producing 800 or more acre-feet/year: a study shall be conducted by a registered professional engineer or geologist that has expertise in groundwater hydrology evaluating the projected effect of the proposed withdrawal on the aquifer or any other aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users in the District. Five copies of the report shall be submitted with the permit application”.

In correspondence dated February 16, 2017, Mr. Jones indicated a hydrogeological report would be submitted to the District upon the District granting “conditional approval” of the application. The hydrogeological report is required at the time the application is turned into the District. Until the report has been received by the District, the application will remain administratively incomplete.

- Rule 8.4 (b)(7) – “the applicant's water conservation plan and, if any subsequent user of the water is a municipality or entity providing retail water services, the water conservation plan of that municipality or entity shall also be provided along with a copy of the contract between the applicant and any subsequent user of the water, indicating that the applicant and that municipality or entity will comply with the District's Conservation Plan”.

The application includes "municipal" as one of the beneficial uses. Please provide the conservation plan for any municipalities, if any, for which you will provide water.

- Rule 8.4 (b)(11) – "Except for exempt wells and wells in the Brazos River Alluvium aquifer formation, the applicant shall send a certified letter of notification to all landowners and/or registration/permit holders that are located within the spacing-requirement circumference of the applied-for well(s). A copy of the landowner letters and proof that it was sent certified mail shall be submitted with the application.

The applicant shall also publish in a newspaper of general circulation in Brazos and Robertson counties a legal notice of the application. A copy of the publisher's affidavit showing publication of the notice shall also be submitted with the application.

The letter and published notices must include:

- (A) the name of the applicant;
- (B) the address or approximate location of the well or proposed well;
- (C) a brief explanation of the proposed permit or permit amendment, including any requested amount of groundwater, the purpose of the proposed use, and any change in use;
- (D) the contact information of the applicant and the District.

At this time, I have no certified letter notification cards alerting landowners and registration/permit holders within the spacing requirement circumference of the application for water production or a publisher's affidavit verifying publication of notice in a newspaper of general circulation in Brazos and Robertson counties. These will be required in order to have an administratively complete application.

- Rule 7.1 (c) – "Production Based Acreage - A permit holder's groundwater production for a new non-exempt well drilled in all aquifers within the District, except the Brazos River Alluvium, is limited by the number of contiguous acres that are legally assigned to the well site. A majority of the contiguous acreage assigned to the well shall bear a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science. The amount of groundwater production based on the assigned contiguous acreage will be determined by the following formula:

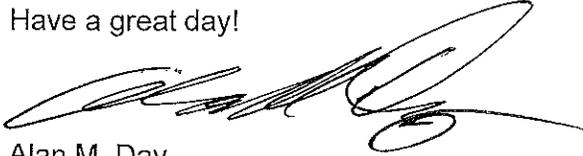
$$\frac{\left(\begin{array}{l} \text{Average Annual} \\ \text{Production Rate} \\ \text{in Gallons/Minute} \end{array} \times \begin{array}{l} \text{District Spacing} \\ \text{Requirement} \\ \text{Between Wells} \end{array} \right)^2 \times \pi}{43,560} = \begin{array}{l} \text{Total number of} \\ \text{contiguous acres} \\ \text{required to be assigned} \\ \text{to the well site} \end{array}$$

The legally assigned acreage associated with the well(s) must be owned or controlled by the applicant. At this time, I can identify two tracts you own and likely control the water rights. I have included with this letter the legally assigned acreage/footprint (production acreage) of the nine (9) proposed wells in aggregate. I will need documents from each of the landowners in the footprint

attesting to your ownership/control of the water rights under the respective parcels.

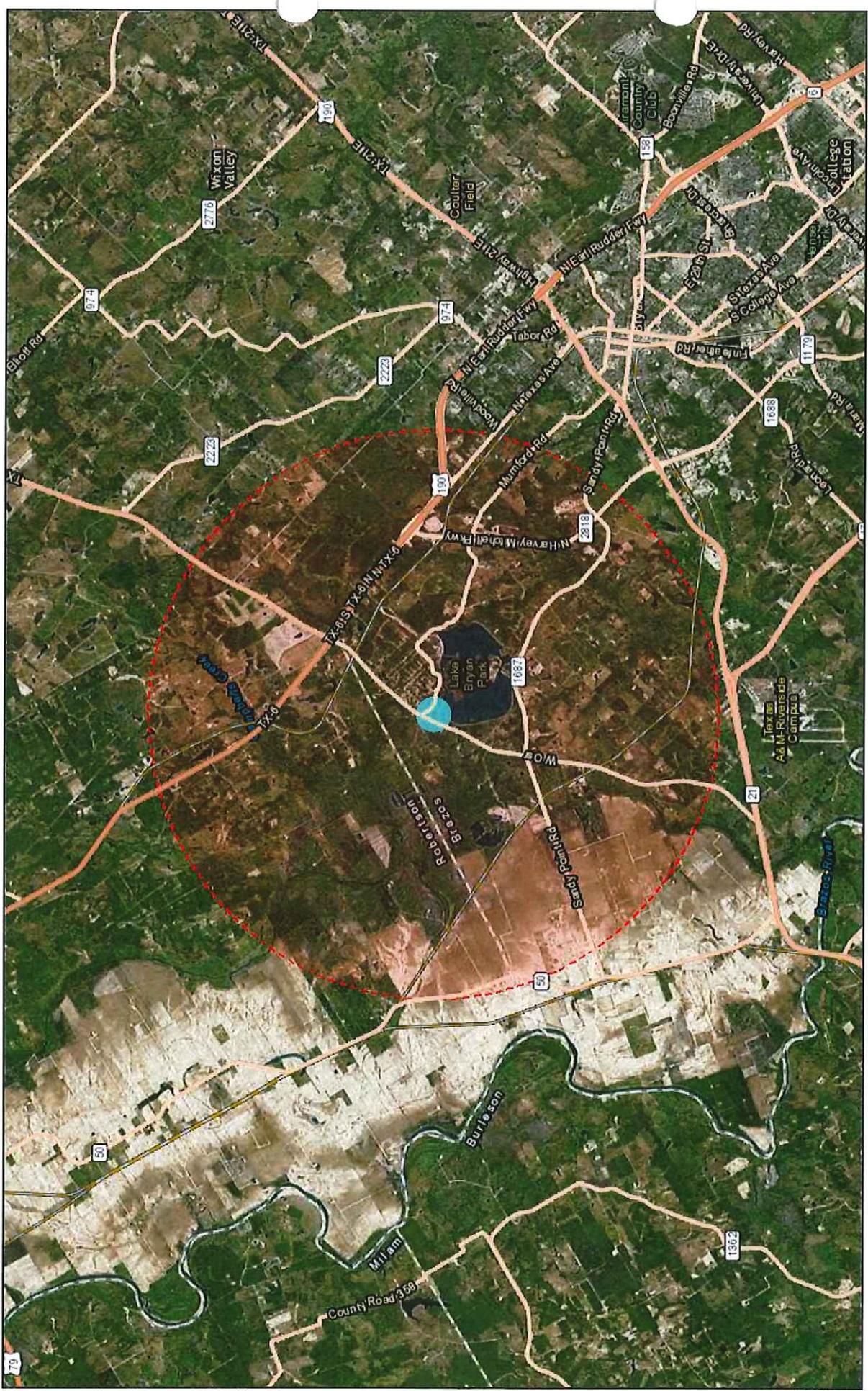
The District processes all permit applications in accordance with District Rules. In order for the application to go to the Board, it must be administratively complete. I look forward to assisting you in any way possible to make the application ready for presentation. Please contact me if you have any questions.

Have a great day!

A handwritten signature in black ink, appearing to read 'Alan M. Day', with a large, stylized flourish at the end.

Alan M. Day
General Manager
Brazos Valley Groundwater Conservation District
979-279-9350 (o)
817-774-6412 (c)
aday@brazosvalleygcd.org

Fazzino Aggregate Footprint - N 30.721905 W 96.477401 - 40,500 ac-ft/yr - 25,110' radius

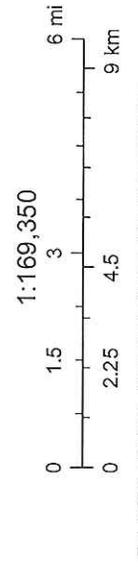


February 27, 2017

pointLayer polygonLayer

Override 1 • Override 1

Coordinate Markers



Esri, HERE, DeLorme, MapmyIndia, © OpenStreetMap contributors
Esri, HERE, DeLorme, MapmyIndia, © OpenStreetMap contributors, and the
BVGCD Web Map
Copyright Half (2017)



SPROUSE SHRADER SMITH PLLC
ATTORNEYS AT LAW

MARVIN W. JONES
(806) 468-3344

Handwritten:
AJD
2-16-17

February 16, 2017

Via Email – aday@brazosvalleygcd.org and Certified Mail – RRR

Alan M. Day
General Manager
Brazos Valley Groundwater Conservation District
112 West 3rd Street
Hearne, TX 77859

RE: Application for Drilling or Operating Permit/Anthony Fazzino

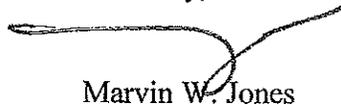
Dear Mr. Day:

This firm represents Anthony Fazzino in connection with his Application for Drilling or Operating Permit ("Application") filed on February 14, 2017. I write to request that you send the Application directly to the Board to resolve a policy question, i.e., whether the District will authorize Mr. Fazzino to produce a large enough volume of groundwater to protect himself against drainage by Bryan's Well No. 18 and to allow him a fair opportunity to produce a fair share of the groundwater in the common reservoir.

I am attaching a map of the proposed well field on the Fazzino tract. If the Board grants conditional approval of the Application, we will submit a hydrogeological report prior to beginning any production from the tract, in the same manner followed by the City of Bryan in connection with its Well No. 18.

Please let me know if you have any questions regarding this request.

Sincerely,



Marvin W. Jones

MSJ:sdf

975173_1.Docx
101655.01

Alan Day

From: Shari Fox <shari.fox@SPROUSELAW.com>
Sent: Thursday, February 16, 2017 11:40 AM
To: Alan Day
Cc: Marty Jones; Shari Fox
Subject: Application for Drilling or Operating Permit/Anthony Fazzino
Attachments: 0354_001.pdf

Mr. Day: Please see attached letter.

Respectfully,

Shari Fox

Shari Fox | Legal Assistant

MARVIN W. JONES AND C. BRANTLEY JONES

SPROUSE SHRADER SMITH PLLC

701 S. Taylor, Suite 500 | Amarillo, Texas 79101

P.O. Box 15008 | Amarillo, Texas 79105-50089

T: 806.468.3309 | F: 806.373.3454

Email: shari.fox@sprouselaw.com – www.SprouseLaw.com



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Alan Day

From: Alan Day
Sent: Tuesday, February 28, 2017 8:04 AM
To: Marty Jones; 'Shari Fox'
Cc: 'monique norman (norman.law@earthlink.net)'; Mike Gershon (mgershon@lglawfirm.com)
Subject: RE: Application for Drilling or Operating Permit/Anthony Fazzino
Attachments: Additonal Information Needed for Fazzino Application 2-28-17.pdf

Mr. Jones,

Please see the attached letter requesting additional information relating to the Anthony Fazzino permit application received February 14, 2017. The requested information will be necessary to declare the application administratively complete.

Do not hesitate to contact me if you have any questions concerning the request.

Have a great day!

Alan M. Day
General Manager
Brazos Valley Groundwater Conservation District
aday@brazosvalleygcd.org
979-279-9350 office
817-774-6412 cell
979-279-0035 fax

From: Shari Fox [<mailto:shari.fox@SPROUSELAW.com>]
Sent: Thursday, February 16, 2017 11:40 AM
To: Alan Day
Cc: Marty Jones; Shari Fox
Subject: Application for Drilling or Operating Permit/Anthony Fazzino

Mr. Day: Please see attached letter.

Respectfully,

Shari Fox

Shari Fox | Legal Assistant
MARVIN W. JONES AND C. BRANTLEY JONES
SPROUSE SHRADER SMITH PLLC
701 S. Taylor, Suite 500 | Amarillo, Texas 79101

RECEIVED
AND 4-4-17



Brazos Valley Groundwater Conservation District

P.O. Box 528
Hearne, TX 77859
Ph: 979-279-9350 Fax: 979-279-0035
E-mail: clopez@brazosvalleygcd.org Website: www.brazosvalleygcd.org

District Use Only
Permit No. _____
BVGCD Well No. _____

**AMENDED
APPLICATION FOR DRILLING OR OPERATING PERMIT**

One (1) Year _____ Five (5) year X

A \$100 fee is due upon submittal of this application for each well requested.

1. Applicant(s) Information:

(a) If the applicant is more than one individual or entity with different residences, attach a written affidavit executed by each individual and/or entity with an interest or their legal representatives describing their respective interests in the well(s), listing their names and addresses, and designating a contact person.

(b) If the applicant is a corporation, partnership, retail water supplier or other business association, state its name and address below and attach written documentation that the contact person is authorized to represent the applicant.

Note: If the applicant is different from the owner of the land on which the well(s) is/are to be located, provide documentation from the property owner granting applicable authority for the applicant to drill and/or operate the well.

Name of Applicant: Anthony Fazzino, Jr.

Email Address: TJFazzino@verizon.net

Mailing

Address: P.O. Box 4694 Bryan, TX 77805-4694

Phone: 979-778-9071 Fax: _____

Contact Person (if different from applicant): Marvin W. Jones

Phone: 806-468-3300 Fax: 806-373-3454

Relationship to Applicant: Attorney

Mailing Address: P.O. Box 15008, Amarillo, TX 79105

2. Amount of Water Requested to be produced under This Permit: See attached sheet.

(a) Provide the amount of water requested for each well in acre-feet/year.

Production 4,839 acre-feet/year 3,000 gpm
Production _____ acre-feet/year _____ gpm
Production _____ acre-feet/year _____ gpm
Production _____ acre-feet/year _____ gpm

*Please attach additional sheets as needed

(b) State the nature and purpose of beneficial use of the groundwater under the requested permit and provide any evidence (if available).

Agricultural, municipal, manufacturing, industrial, commercial or other
beneficial use as defined under Texas Water Code Section 36.001(9)

(c) Estimated Date/Year Drilled: 2017-2020

Drilling Company: To be determined Phone: _____

Address: _____ City: _____

State: _____ Zip code: _____

(d) Identify the aquifer(s) from which the well(s) in this application will produce:

Simsboro: X, Carrizo: _____, Calvert Bluff: _____,

Hooper: _____, Gulf Coast: _____, Queen City: _____,

Sparta: _____, Yegua: _____, Brazos River Alluvium _____,

(e) Well Information To be determined

Total Depth: _____ Ft. Depth to First Screen: _____ Ft.

Inside Diameter of Casing: _____ In. Pump Size: _____ hp

(f) If the place of use of the groundwater is outside the district's boundaries, please indicate here with an "X": To be determined

(g) Well Location:

Well Site Physical Address: 3008 W. OSR

City: Bryan State: TX Zip: 77807

County: Brazos

Latitude: 30.724185 Longitude: -96.477422

Survey Name* Thomas Henry Survey No* A-128

Abstract No* A012800

Section*: _____ Block*: _____

*Asterisk indicates "if known"

3. Attachments to Application

(a) **For all wells drilled in the Simsboro Formation, provide the landowners name, contact information, and documentation showing clear legal authority, signed by the landowner of the real estate within the required contiguous acreage (per district Rule 7.1(c)), allowing water production from the requested well.**

(b) **Water Conservation Plan (Please check one):**

I have attached a water conservation plan showing what conservation measures I have adopted or will adopt what conservation goals I have established, and what measures and time frames are necessary to achieve my established water conservation goals.

OR

I declare that I will comply with the District's management plan.

(c) **Drought Contingency Plan (Please check one):**

I have attached a drought contingency plan showing what drought conservation measures I have adopted or will adopt, what drought conservation goals I have established, and what measures and time frames are necessary to achieve my established drought contingency goals.

OR

I declare that I will comply with the District's drought contingency plan.

(d) **Well Closure Plan (Please check one):**

I have attached a well closure plan.

OR

I declare that I will comply with the District's well plugging guidelines and report well closure to the District.

I agree that any water withdrawn under the authority of a permit issued based upon the District's grant of this application will be put to beneficial, non-wasteful use at all times, and will not exceed the production allowance of the permit. I agree that reasonable diligence will be used to protect groundwater quality.

I agree to abide by the terms of the District Rules, the District Management Plan, and orders of the Board of Directors, as required by State law. My certification of this application does not waive my right to protest in the future proposed District actions, including proposed amendments to District Rules. However, once the District adopts Rules, Management Plans, Permits, etc., I agree to abide by those terms, as required by State law.

I hereby certify that the information contained herein is true and correct to the best of my knowledge and belief.

Signature of Applicant: *Clay J. Higgins*

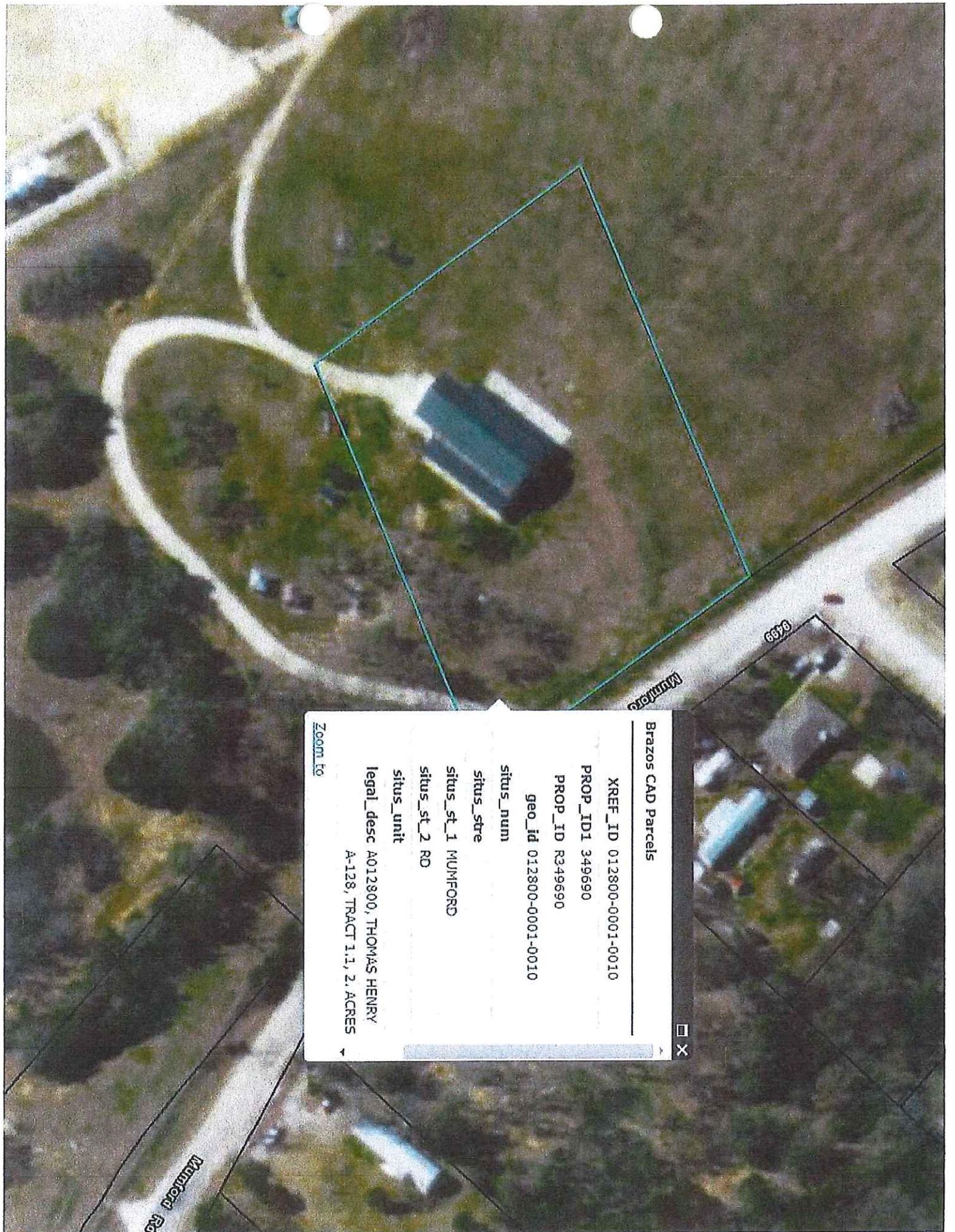
Date: 04 April 2017

Application Revised 8-15-14

<u>District Use Only</u>	
Date received	<u>4-4-17</u>
Permit No.	_____
BVGCD Well No.	_____
Hearing date	_____
Action	_____
Comments/notes:	_____

ADDITIONAL SHEET ATTACHED TO APPLICATION OF ANTHONY FAZZINO

NOTE: Applicant is applying for an amount of groundwater production that will begin to offset the production from the City of Bryan's Well No. 18 and to give Applicant a fair opportunity to produce his fair share of the groundwater in the reservoir.



Brazos CAD Parcels

XREF_ID 012800-0001-0010

PROP_ID1 349690

PROP_ID R349690

geo_id 012800-0001-0010

situs_num

situs_stre

situs_st_1 MUMFORD

situs_st_2 RD

situs_unit

legal_desc A012800, THOMAS HENRY

A-128, TRACT 1.1, 2, ACRES

Zoom to



Brazos CAD Property Search

Property ID: 15796 For Year 2017

Map



Property Details

Account

Property ID: 15796
 Legal Description: A012800, THOMAS HENRY A-128, TRACT 1, 26.65 ACRES, & A023400 O WILCOX
 Geographic ID: 012800-0001-0000
 Agent Code:
 Type: Real
 Location
 Address: W OSR TX
 Map ID: 504-240
 Neighborhood CD: 0423272E
 Owner
 Owner ID: 261993
 Name: FAZZINO ANTHONY J ETAL
 Mailing Address: PO BOX 4694
 BRYAN, TX 77805-4694
 % Ownership: 100.0%
 Exemptions: For privacy reasons not all exemptions are shown online.

Property Values

Improvement Homesite Value:	N/A
Improvement Non-Homesite Value:	N/A
Land Homesite Value:	N/A
Land Non-Homesite Value:	N/A
Agricultural Market Valuation:	N/A
Market Value:	N/A
Ag Use Value:	N/A
Appraised Value:	N/A
HS Cap:	N/A
Assessed Value:	N/A

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G1	BRAZOS COUNTY		N/A	N/A	N/A	N/A
S1	BRYAN ISD		N/A	N/A	N/A	N/A
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Mr. Gershon's Direct Line: (512) 322-5872
Email: mgershon@lglawfirm.com

February 1, 2018

Mr. Marvin W. "Marty" Jones
Sprouse Shrader Smith PLLC
701 S. Taylor, Suite 500
Amarillo, Texas 79105

Re: Mr. Anthony Fazzino's Permit Application Filed April 4, 2017 and
Dismissed September 6, 2017 Pursuant to Texas Water Code § 36.114(g)

Dear Mr. Jones:

This letter responds to Mr. Fazzino's recently amended petition and your letter dated January 9, 2018, which asserts that the District has "effectively denied" Mr. Fazzino's above-referenced permit application. The District has not denied Mr. Fazzino's application. In fact, the District's Board of Directors has never considered the application on a public agenda or acted on the application in any manner. Additionally, the District's General Manager offered to declare it administratively complete and set it for hearing if Mr. Fazzino would amend the application to request an annual Simsboro groundwater production level up to 821 acre feet (267.5 million gallons per year) consistent with the District's rules. Please see the attached September 6, 2017 letter from District General Manager Mr. Alan Day.

Mr. Fazzino did not respond to Mr. Day's letter. As a result, pursuant to Texas Water Code § 36.114(g) and District Rule 14.2(a), the application expired and was *dismissed*. To be clear, the application was *not denied*. The application may be refiled, and would be processed by the District as soon as it is administratively complete.

If you have any questions or further request for clarification, please do not hesitate to contact me.

Sincerely,



Michael A. Gershon
Attorney for BVGCD

Attachment

cc: Mr. Alan M. Day, General Manager
Ms. Monique M. Norman, General Counsel
Brazos Valley Groundwater Conservation District

Mr. J. Troupe Brewer *of the firm*



BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT

P.O. Box 528 · HEARNE, TX 77859 · (979)279-9350 · FAX: (979)279-0035
WWW.BRAZOSVALLEYGCD.ORG

September 6, 2017

Mr. Anthony Fazzino
c/o Marvin W. Jones
P.O. Box 15008
Amarillo, Texas 79105

Re: Amended Drilling/Operating Permit Application Administratively Incomplete

Dear Mr. Fazzino,

I recently received a letter from Mr. Brantley Jones regarding the administrative completeness of your amended Drilling/Operating Permit Application, which was initially filed with the District on February 28, 2017, and substantially amended with a "replacement application" on April 4, 2017. As a courtesy, I have applied applicable statutory and regulatory timelines based on the April 4th filing date to provide you with additional time to gather and submit the information required for the application to be administratively complete. The applicant allowed the permit application to expire, pursuant to the District's rules and State Law, because the applicant did not submit all of the information required for the District to deem the permit application administratively complete within the applicable deadlines.

Permit Application is Not Administratively Complete

Pursuant to District Rule 14.2 and Texas Water Code Section 36.114, a hearing on a permit application shall be held for "administratively complete" applications. In order to be administratively complete, the permit application must comply with the District's rules. The Fazzino permit application is not administratively complete because of failure to comply with the following District rules:

Rule 7.1 (c) – "Production Based Acreage - A permit holder's groundwater production for a **new non-exempt well** drilled in all aquifers within the District, except the Brazos River Alluvium, is limited by the number of contiguous acres that are legally assigned to the well site. A majority of the contiguous acreage assigned to the well shall bear a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science. The amount of groundwater production based on the assigned contiguous acreage will be determined by the following formula:

$$\left(\frac{\text{Average Annual Production Rate in Gallons/Minute} \times \text{District Spacing Requirement Between Wells}}{\text{District Spacing Requirement Between Wells}} \right)^2 \times \pi = \text{Total number of contiguous acres required to be assigned to the well site}$$

43,560

BOARD OF DIRECTORS:
DAVID STRATTA, SECRETARY
STEPHEN CAST

JAN ROE, PRESIDENT
BILL HARRIS
PETE BRIEN

MARK CARRABBA, VICE PRESIDENT
BRYAN RUSS, JR.
JAYSON BARFNECHT

Rule 1.1 (32) "Property legally assigned to a well" is property owned or legally controlled for purposes of groundwater withdrawal by a well owner or operator and assigned to a specific well by the owner or operator.

The District's production acreage rule is authorized by § 36.116(a), Water Code, which allows the District to adopt rules to regulate the production of groundwater by setting production limits on wells and limiting the amount of water based on acreage, tract size, or a defined number of acres assigned to a well site.

The District has not received documents, evidence, or assertions indicating that the applicant has legal authorization to assign the water rights within a 3000' radius of the proposed well site, which encompasses 649 acres of required contiguous acreage in Brazos County. To the District's limited knowledge, based on the information submitted in Mr. Fazzino's application, the Fazzino family may only control the water rights related to about 27 acres.

The attached map indicates the applied-for acreage assigned to the well. The Fazzinos appear to control about 27 acres, indicated within the blue outline. The applicant has not provided legal authority over the water rights of the other 622 acres of production acreage assigned to the well, indicated in the brown circle. The District must have evidence of legal control over the water rights, including but not limited to any groundwater leases, groundwater agreements, titled ownership, mineral leases or other pertinent information having direct bearing on the authentication of your ownership and control of the water rights under the prescribed footprint, and any restrictions on that ownership and control.

Alternative Path to Administrative Completeness

As an alternative, the District provided multiple options for Mr. Fazzino's application to be amended by the applicant to become administratively complete at which time the District could set a hearing, if the permit application would request water production based upon the District's rules to reflect the water rights that are currently legally owned or controlled by the applicant. The potential application amendment scenarios to comply with Rule 7.1(c) were:

1. Amend your application using the current location of the well. If you were to choose this option, water production from a well screening the Simsboro Aquifer would amount to approximately 190 ac-ft/yr (map included).
2. Amend your application to maximize the location of the well. If you were to choose this option, water production from a well screening the Simsboro Aquifer would amount to approximately 821 ac-ft/yr (map included).

However, the application was not amended to reflect the water rights that Mr. Fazzino legally controls.

Expiration of Permit Application

Under District Rule 14.2 and § 36.114, Water Code, the Board shall hold a hearing and act on administratively complete applications. On April 13, 2017, the District first sent a letter indicating the permit application that was substantially amended on April 4, 2017 was administratively incomplete with a list of needed information.¹ Then again, on June 26, 2017,

¹ Please also refer to my letter dated February 28, 2017, and multiple communications with applicant's representatives about the application initially filed on February 14, 2017. In those communications, I made the applicant aware of the same informational requirements of Rule 7.1(c) that are set forth in my letters dated April 13, 2017 and June 26, 2017.

after several communications with the applicant's representatives, the District sent the applicant a letter listing the deficient information that was required for an administratively complete application. The District also offered the applicant options of how to amend the application to complete the application. The applicant has not supplemented or amended their application.

Section 36.114(g), Water Code, states that the District may by rule set a time when an application will expire if the information requested in the application is not provided to the District. Section 36.114(g) has been implemented by District Rule 14.2(a), which states:

Applications that are not administratively complete will be sent back to the applicant with a list of needed information. If the District does not receive an administratively complete application within 60 days of the District sending the incomplete application notice, then the District may consider the application expired. If an incomplete application expires, the applicant will be required to submit a new application and the deadlines under this Rule will begin again.

Sixty days have passed since my last incomplete application notice. Therefore, Mr. Fazzino's application expired on August 25, 2017. The applicant will be required to submit a new application. If a new application is submitted, please provide documentation from Mr. Fazzino's cotenants establishing applicable authority to construct and operate a well on the relevant property for the proposed use. It was recently brought to our attention by Mr. Fazzino's other legal counsel, Mr. Doug Caroom, that Mr. Fazzino only holds an undivided 25% interest in acreage identified in the application.

Although no new substantive information was submitted in Mr. Jones' letter of August 16, 2017, he requested a variance to the administratively completeness Rule 14.2 and the production acreage Rule 7.1(c). The District's rules do not provide a variance or any type of exception for these rules.

Applicant's Well is a "New Well"

Although Mr. Jones refers to the City of Bryan's Well No. 18 permit application and asks for the same treatment, the two wells and permit applications are not legally analogous. Significant development of the referred-to City of Bryan Well No. 18 commenced prior to the effective date of the District's initial set of rules, which went into effect on December 2, 2004. Over a decade ago, after extensive public input and rulemaking hearing, our Board adopted rules applicable to existing wells and new wells.

The Bryan Well No. 18 is an "existing well" under the District's rules:

Rule 1.1

(15) "Existing Well" means a groundwater well within the District's boundaries, for which drilling or significant development of the well commenced before the effective date of the District's rules on December 2, 2004.

(28) "New Well" means any Well other than an existing well.

(29) "New Well Application" means an application for a permit to drill and operate a new well.

The production acreage rules only apply to "new non-exempt wells," for which significant development or drilling commenced *after* the District's rules went into effect on December 2, 2004. Therefore, the production acreage rules did not apply to the City of Bryan Well No. 18. The District's production rules do not apply to many "existing wells" in the District that were

drilled before the District's rules; nonetheless, the District's Board considered the needs of future groundwater users and adopted rules allowing for new uses and for the drilling and production of new wells.

The District cannot retroactively redefine the Bryan Well No. 18 as a "new well" subject to the production and spacing requirements applicable to a "new well." Nor can the District recategorize "new wells" as "existing wells," whether by variance, exception or otherwise.

Mr. Fazzino's permit application was first submitted to the District on April 4, 2017, and is therefore, a "new well," which must comply with the District's production acreage and spacing rules.

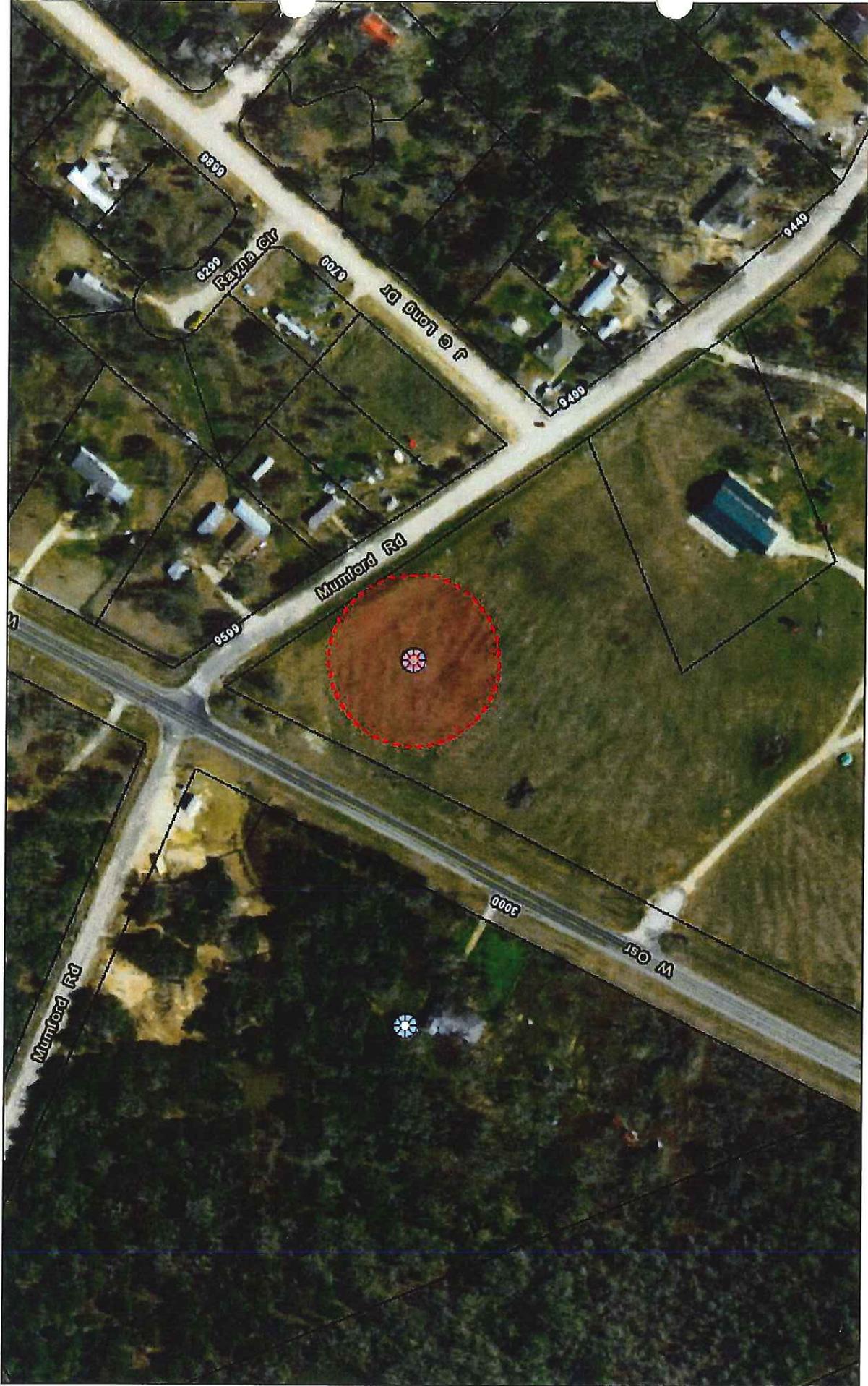
I am happy to answer any questions that you may have.

Thank you,

A handwritten signature in black ink, appearing to read 'Alan M. Day', with a long, sweeping horizontal line extending to the right.

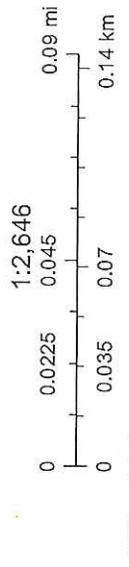
Alan M. Day
General Manager
Brazos Valley Groundwater Conservation District
979-279-9350 (o)
817-774-6412 (c)
aday@brazosvalleygcd.org

Fazzino - Current Location - Approx. 190 ac-ft./yr



June 26, 2017

- pointLayer**
 - Override 1
 - BVGCD Wells
- polygonLayer**
 - Brazos CAD Parcels
 - Robertson CAD Parcels



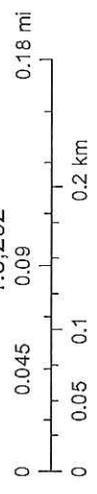
Fazzino - Maximized Location - Approx. 821 ac-ft./yr



June 26, 2017

- pointLayer ● Override 1
- pointLayer ● BVGCD Wells
- polygonLayer Brazos CAD Parcels
- polygonLayer Robertson CAD Parcels

1:5,292



Half Associates, Inc.
Esri, HERE, DeLorme, MapmyIndia, © OpenStreetMap contributors



SPROUSE SHRADER SMITH PLLC
ATTORNEYS AT LAW

MARVIN W. JONES
(806) 468-3344

ATTACHMENT 6

February 16, 2017

Via Email – aday@brazosvalleygcd.org and Certified Mail – RRR

Alan M. Day
General Manager
Brazos Valley Groundwater Conservation District
112 West 3rd Street
Hearne, TX 77859

RE: Application for Drilling or Operating Permit/Anthony Fazzino

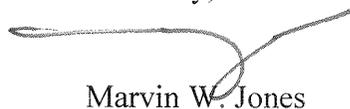
Dear Mr. Day:

This firm represents Anthony Fazzino in connection with his Application for Drilling or Operating Permit (“Application”) filed on February 14, 2017. I write to request that you send the Application directly to the Board to resolve a policy question, i.e., whether the District will authorize Mr. Fazzino to produce a large enough volume of groundwater to protect himself against drainage by Bryan’s Well No. 18 and to allow him a fair opportunity to produce a fair share of the groundwater in the common reservoir.

I am attaching a map of the proposed well field on the Fazzino tract. If the Board grants conditional approval of the Application, we will submit a hydrogeological report prior to beginning any production from the tract, in the same manner followed by the City of Bryan in connection with its Well No. 18.

Please let me know if you have any questions regarding this request.

Sincerely,

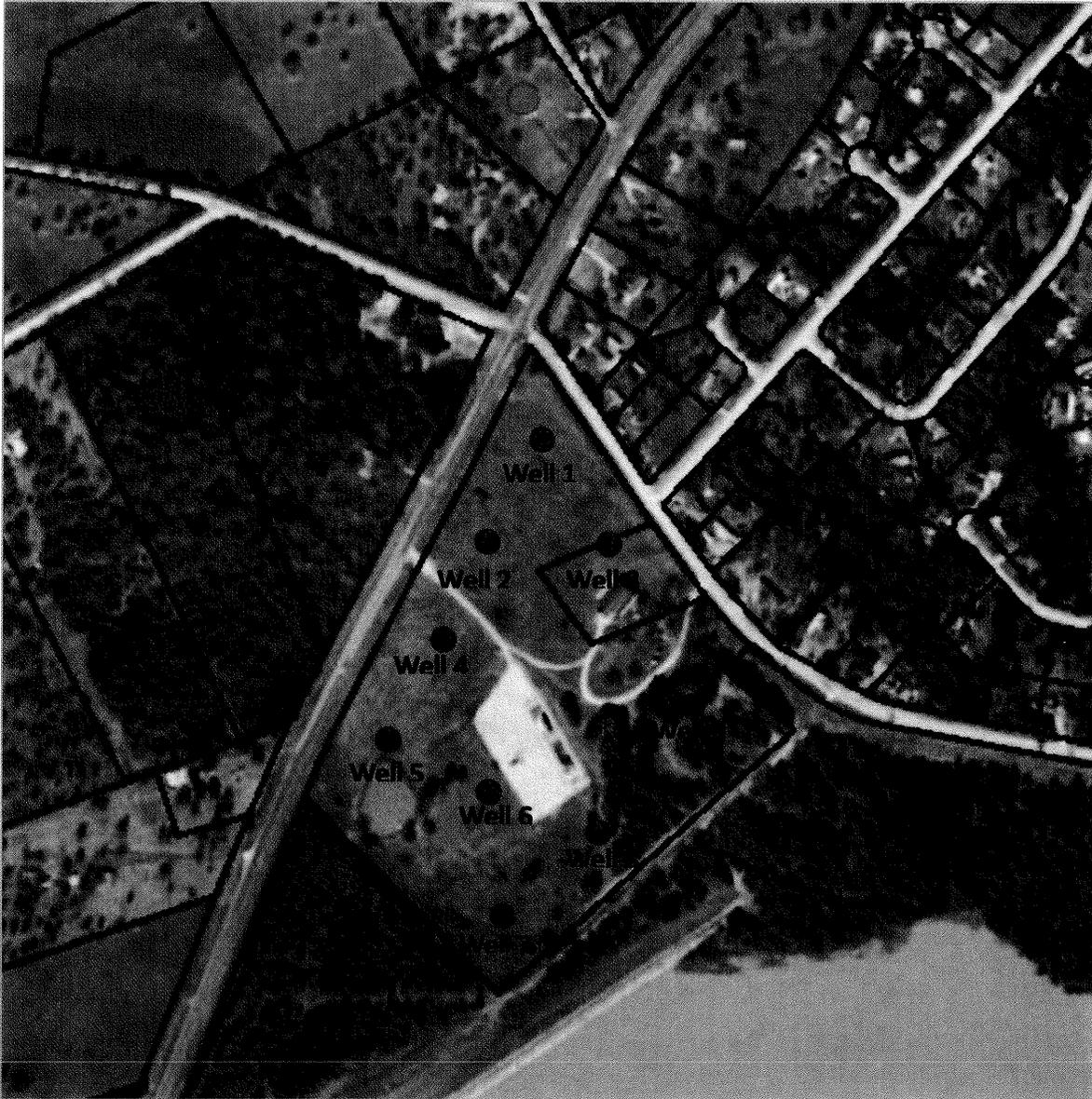


Marvin W. Jones

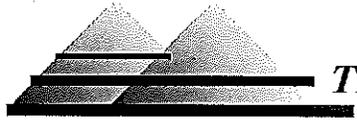
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101655.01

Fazzino Well Field



Well 1	Long: -96.477422	Lat: 30.724185
Well 2	Long: -96.477905	Lat: 30.723392
Well 3	Long: -96.476832	Lat: 30.723364
Well 4	Long: -96.478291	Lat: 30.722626
Well 5	Long: -96.478796	Lat: 30.721851
Well 6	Long: -96.477894	Lat: 30.721445
Well 7	Long: -96.477776	Lat: 30.720477
Well 8	Long: -96.476907	Lat: 30.721141
Well 9	Long: -96.476060	Lat: 30.722110



April 14, 2017

Mr. Marvin Jones
701 S. Taylor Suite 500
Amarillo, Texas 79101

Re: Simsboro Aquifer Impact Assessment
Anthony Fazzino, Jr. Permit Application –
Proposed Simsboro Well
Brazos County, Texas

Dear Mr. Jones:

Per your request and in compliance with the rules of the Brazos Valley Groundwater Conservation District (BVGCD), Thornhill Group, Inc. (TGI) provides herein an evaluation of the projected effect of producing 4,839 acre-feet of water per year from a proposed production well to be completed in the Simsboro aquifer in Brazos County (see Attachment 1). The proposed well will be located on approximately 26 acres located off Texas OSR, approximately 2 miles southwest of US 190 in Bryan, Texas. Production capacity from the proposed well will be approximately 3,000 gallons per minute (GPM). TGI's evaluations focused on assessing local aquifer parameters and how production from the subject well may influence other groundwater users in the BVGCD. TGI's evaluations are based on reported data, published reports, and TGI's extensive experience and knowledge of the Simsboro aquifer in Central Texas, the BVGCD, and Robertson County. Specifically, TGI worked to accomplish the following goals:

- Determine the local physical characteristics and hydraulic parameters of the aquifer;
- Calculate the potential drawdown at the well;
- Evaluate potential interference from other production in the area; and,
- Provide a report of the hydrologic effects of production from the subject well.

Aquifer Characteristics

Based on available information for the area, the top of the Simsboro aquifer is approximately 2,100 feet below ground level (BGL) and the unit is approximately 600 feet thick with approximately 520 feet of net sand thickness.* At the property the aquifer is under artesian conditions with a water level approximately 250 feet BGL. That is, the aquifer is under pressure and water levels in wells completed in the unit rise more than 1,800 feet above the

* TGI reviewed geophysical logs Q-50, Q-239, Q-182a, Q-54, and Q-51 located within 5 miles of the subject property.

top of the Simsboro. The City of Bryan Well #18 (SWN 59-21-108), which is approximately 0.25 miles northeast of the proposed production well, is screened across 375 feet of sand.

Using the Groundwater Availability Model for the Queen City and Sparta Aquifers (GAM), TGI extracted estimates of the hydraulic parameters near the proposed well site. According to the GAM, the hydraulic conductivity of the Simsboro is approximately 31 feet per day (ft/d) at and near the property and the thickness of the Simsboro is about 480 feet; these values are multiplied and result in a transmissivity value for the local Simsboro aquifer of over 110,000 gallons per day per foot (gpd/ft). The net sand thickness at the nearest Q-log (Q-50, 0.5 miles up dip) is approximately 520 feet, which multiplied by the GAM hydraulic conductivity of 31 ft/d results in a transmissivity of 120,000 gpd/ft. Transmissivity of the local aquifer can be estimated by multiplying a well's specific capacity by an empirical factor, typically 2,000 to 2,400 for artesian aquifers. For conservative estimates, TGI will use an estimated transmissivity of 90,000 gpd/ft calculated using an empirical factor of 2,000 and the reported specific capacity of 45 gpm/ft for the City of Bryan Well #18 (SWN 59-21-108).

The storage coefficient for an artesian aquifer is typically between 0.00001 and 0.001 with a value of 0.0001 assumed for most artesian conditions. Aquifer testing of the Simsboro at the nearby lignite mine has shown that during long-term production the aquifer behaves as a leaky system with a storage coefficient of 0.001 or higher. For estimation of aquifer impacts, TGI used the value of 0.0001 for short-term pumping and 0.001 for long-term.

Projected Effects of Proposed Withdrawal

The immediate impacts from production will be drawdown at the pumping well. As the well pumps, artesian pressure or potentiometric head around the well will decline forming a cone of depression. As production continues the cone of depression will extend radially from the well until an aquifer boundary is reached or the production rate reaches equilibrium with the inflow. To evaluate the aquifer impacts, TGI used the Theis non-equilibrium equation to calculate theoretical potentiometric head declines at and surrounding the production well. This method is commonly and routinely used by professional geologists and hydrogeologists in making determinations of drawdown; for the subject well setting and the local Simsboro aquifer, most of the assumptions applicable to the Theis equation are satisfied, so this approach is satisfactory for calculating potential aquifer impacts due to pumping of the subject well. Importantly, the Theis non-equilibrium equation does not consider recharge and provides a conservative estimate of potentiometric head declines.

The well and pumping equipment will be designed to produce at a rate of approximately 3,000 GPM. At this rate, the projected drawdown at the well after 24 hours of continuous pumping is approximately 74 feet. If the well were to continue to pump for 30 days continuously, the projected drawdown is approximately 87 feet. In addition, based on the approximate location of the proposed well, projected drawdown 2,000 feet away would be approximately 16 feet and 29 feet after one (1) day and 30 days, respectively. Attachment 2 provides a chart

illustrating the drawdown versus distance from the pumping well. The following table summarizes the short-term effects of production from the subject well and assumptions used to calculate the effects:

Effects on Aquifer from Short-Term Production (Maximum Rate of 3,000 GPM)					
Distance from Well (Feet)	Transmissivity (gpd/ft)	Storage Coefficient (Dim)	Production Rate (gpm)	Duration (Days)	Drawdown (Feet)
1	90,000	0.0001	3,000	1	74
				30	87
2,000	90,000	0.0001	3,000	1	16
				30	29

Additionally, TGI calculated the long-term (i.e., water-level declines) effects of production based on the anticipated annual production of 4,839 acre-feet per year, a continuous average rate of approximately 3,000 GPM, from the subject well. TGI assumed that under long-term production conditions the aquifer would transition toward a leaky system with a storage coefficient of 0.001. Calculations based on the long-term rate and storage coefficient suggest that there will be minimal impact from production. Calculated potentiometric head declines at the well are projected to be approximately 88 feet after one (1) year and increase by about nine (9) feet after nine (9) additional years of pumping. Similarly, potentiometric head declines 2,000 feet from the well are projected to be approximately 30 feet and 36 feet after one (1) and ten (10) years of production, respectively. Potentiometric head declines at the property represent about five (5) percent of the total artesian head. Attachment 2 provides a chart illustrating the long-term drawdown versus distance from the pumping well. The following table summarizes the effects of the average annual production from the subject well and assumptions used to calculate the effects:

Effects on Aquifer from Long-Term Production (Average Annual Production)					
Distance from Well (Feet)	Transmissivity (gpd/ft)	Storage Coefficient (Dim)	Production Rate (ac-ft/yr)	Duration (Years)	Drawdown (Feet)
1	90,000	0.001	1,400	1	88
				5	94
				10	97
				50	102
2,000	90,000	0.001	1,400	1	30
				5	36
				10	37
				50	45

As shown above the projected effects of long-term production will be minimal. The long-term effect of water-level decline due to production from the subject well on other groundwater users in the BVGCD will be minor; in fact, it is very likely the declines will be less than the

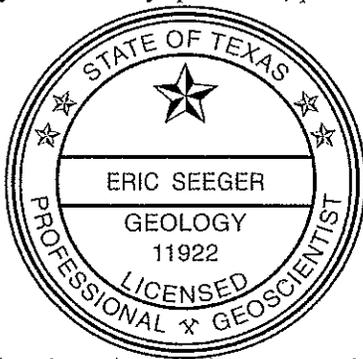
values calculated herein. However, actual water-level declines in the aquifer may be greater than the declines detailed above due to the total production from other Simsboro wells in the area (i.e., interference drawdown), particularly Simsboro wells used for municipal supply and farming operations; within the area of the proposed well, the greatest source of interference drawdown will be from municipal supply wells. Despite the potential fluctuations in water level, the Simsboro aquifer will remain completely saturated with very little production coming from storage. In addition, there is no hydrogeologic reason to expect subsidence as a result of production from the subject well.

Summary and Conclusions

The Simsboro aquifer is the best option for groundwater from the subject property to provide the applicant's needs of 4,800 acre-feet/year. This is needed to offset the production of the City of Bryan Well #18 and to give Mr. Fazzino, Jr. a fair opportunity to produce his fair share of the groundwater in the Simsboro aquifer. Also, while there are some wells completed in other aquifers (Queen City and Sparta) in the area, the production capacity does not allow for efficient production of Mr. Fazzino, Jr.'s needs. The Simsboro aquifer beneath the property is a proficient resource that is the best and most viable option to supply Mr. Fazzino, Jr.'s needs on the property.

The subject well will be designed to produce 3,000 gpm with an annual production rate of 4,839 acre-feet per year (average rate of 3,000 GPM). Based on the production rate and highly productive characteristics of the local Simsboro aquifer, there will be a minimal effect on other groundwater users in the BVGCD. The primary effect will be temporary interference drawdown caused by relatively short-term pumping at the design rate of 3,000 gpm for the well. When the well is turned off, the potentiometric head will recover to, or very close to, pre-pumping levels. Overall potentiometric head declines will be minimal from year to year, even after many years of pumping. Production from the subject well will not cause depletion from the aquifer, as all water will come from a reduction in artesian pressure. Aquifer declines in the area will primarily be caused by the combined production for farming operations and municipal supply.

If you have any questions, please call.



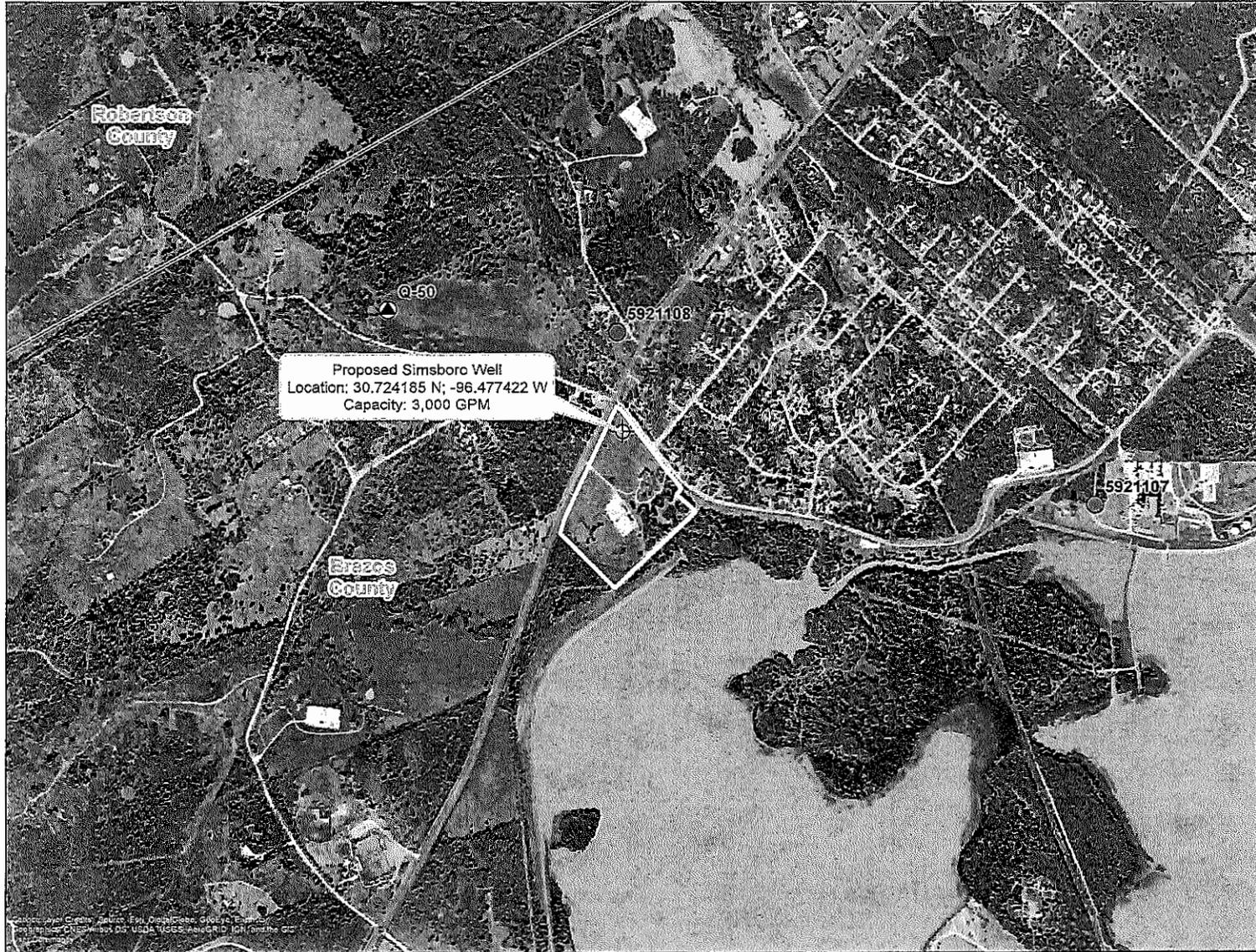
The seal appearing on this document was authorized by Eric Seeger, P.G. on April 14, 2017.

Sincerely,
THORNHILL GROUP, INC.



Eric Seeger, P.G.
Hydrogeologist

**ATTACHMENT 1 –
LOCATION MAP**

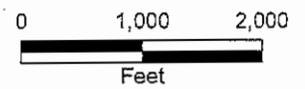


Explanation

-  Proposed Production Well
-  Wells reported as being completed in the Simsboro aquifer
-  Q-log
-  Approximate Property Boundary
-  County Boundary



Scale:



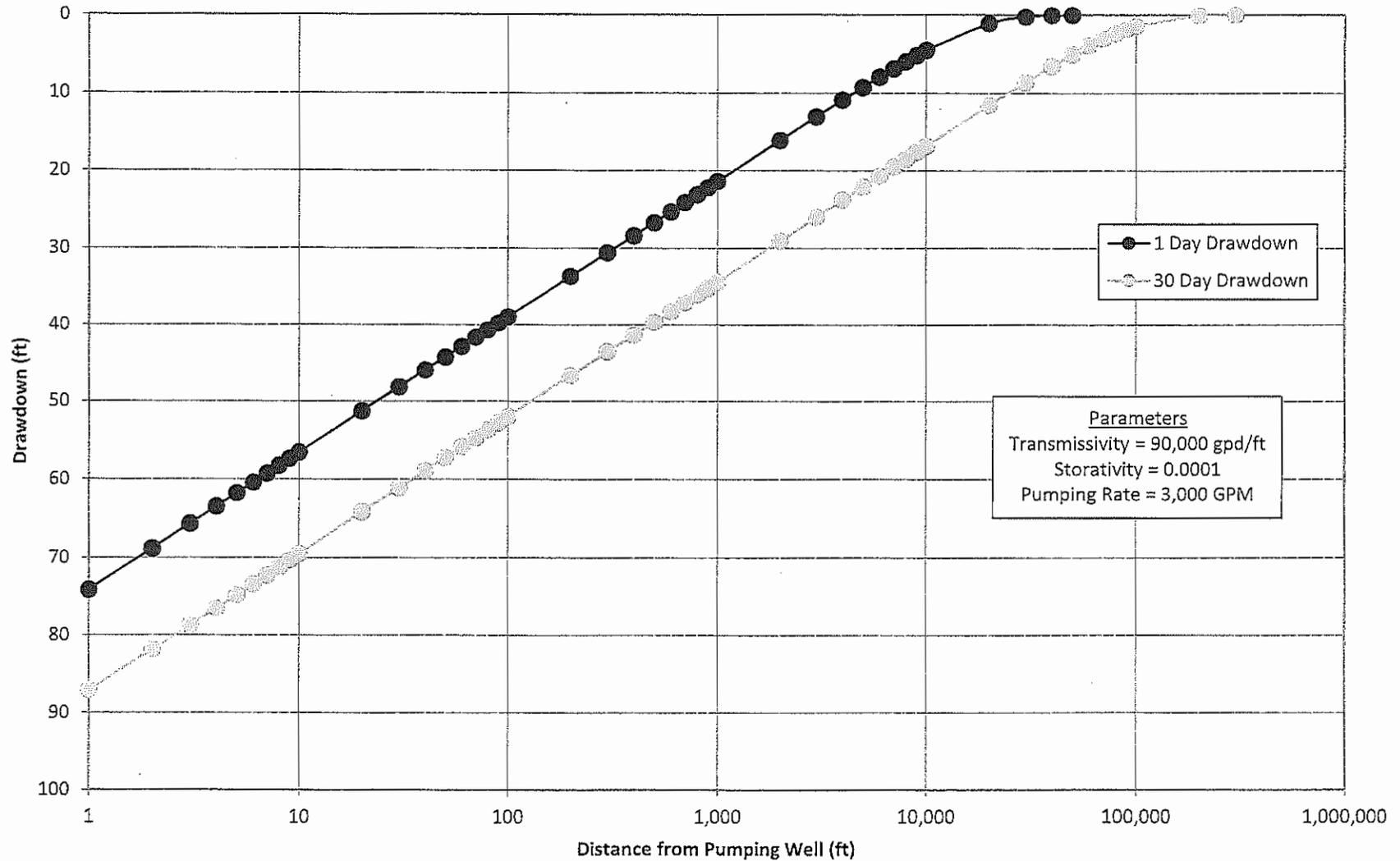
Fazzino, Jr. Simsboro Well Permit Application

Location Map

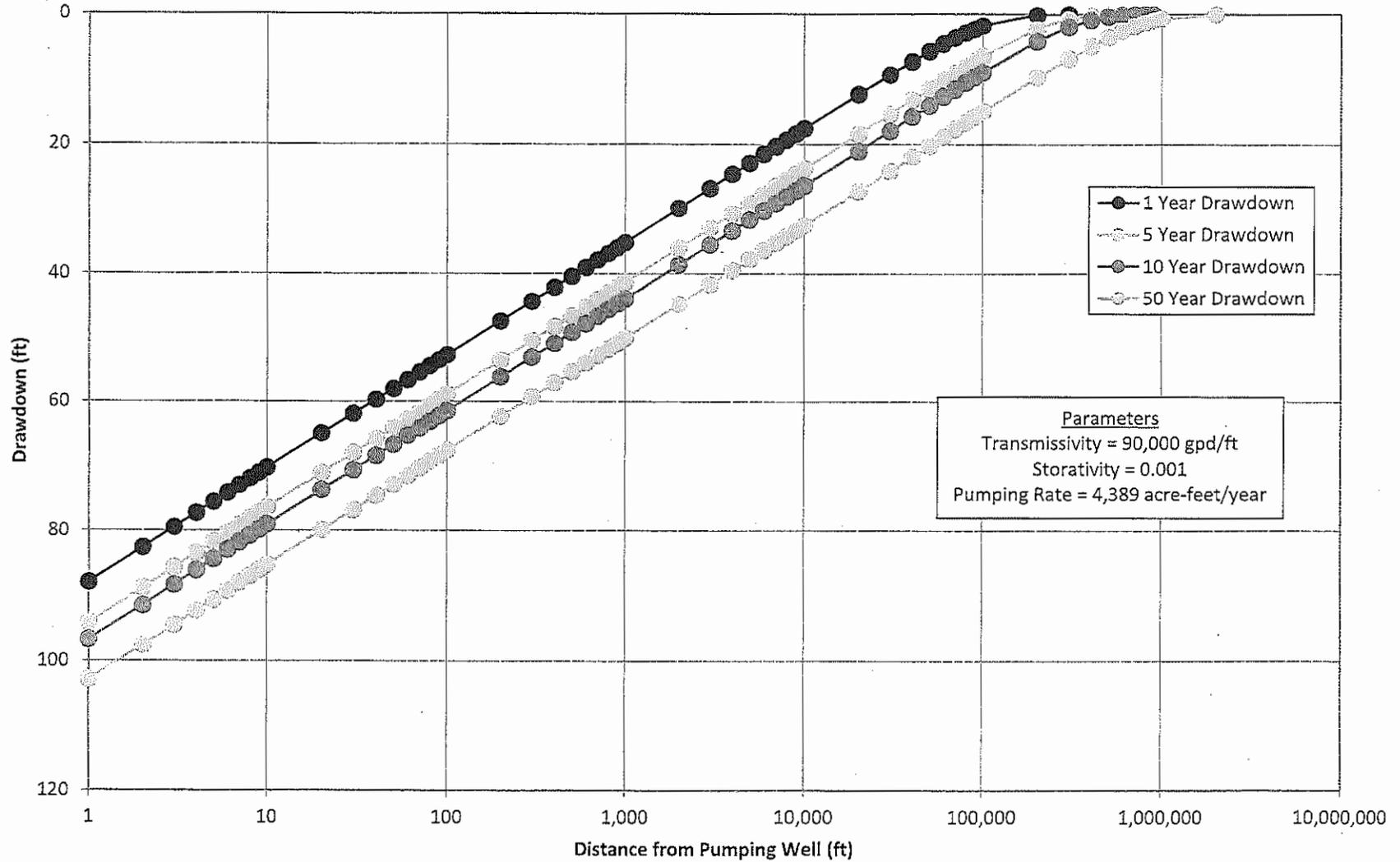


**ATTACHMENT 2 –
DISTANCE-DRAWDOWN CHARTS**

Fazzino Jr. Production Well Distance-Drawdown Relationship – Simsboro Aquifer Short-term Water-Level Declines



Fazzino Jr. Production Well Distance-Drawdown Relationship – Simsboro Aquifer Long-term Water-Level Declines



AFFIDAVIT OF W. JOHN SEIFERT, JR., P.E.

BEFORE ME, the undersigned authority, on this day personally appeared W. John Seifert, Jr. P.E., who, being by me duly sworn, deposed as follows:

Qualifications and Experience

1. My name is W. John Seifert, Jr. I am over 21 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

2. I am a licensed professional engineer and Senior Project Manager with LBG-Guyton Associates, Member of WSP, a professional hydrogeology, groundwater resources and environmental engineering firm that has been in business for more than 50 years. I have been a practicing hydrologist and engineer in the State of Texas for 44 years. A copy of my resume is included as Exhibit A.

3. I have Bachelor of Science and Master of Science degrees in Agricultural Engineering received from Texas A&M University. I am a licensed professional engineer with the State of Texas and a member of the Association of Groundwater Scientists and Engineers (National Ground Water Association).

4. Through my consulting practice, our firm, with me as the Project Manager, have performed studies for cities, counties, industry, water districts, land developers and mining companies for projects that have occurred in 6 states and 4 countries. Some of the projects included groundwater availability studies for the development of well fields that produced up to 15 million gallons per day (MGD). I have prepared designs and construction specifications for over 35 large-capacity public supply wells and have

provided construction management during the projects. I have worked on projects related to groundwater development and injection of groundwater for open pit gold mining operations with pumping rates that reached over 50 MGD.

5. I have on a number of occasions, provided testimony and served as a groundwater expert witness in administrative hearings before the Texas Commission on Environmental Quality, Texas Water Development Board and out-of-state utility regulatory agencies.

6. I have extensive experience in water development and management projects regarding the Carrizo-Wilcox Aquifer and the Simsboro Sand, one of the three units within that aquifer group. The other two units are the Calvert Bluff and Hooper, layered sand and clay formations above and below the Simsboro, respectively. I have provided groundwater hydrology services to the Brazos Valley Groundwater Conservation District (BVGCD) since 2001. The services have included development of their initial groundwater database, reviewing large-capacity well applications, assisting with the development and revision of District rules and other assignments to address groundwater conservation and management. While working for the BVGCD, aquifers studied include the Sparta, Queen City, Carrizo, Simsboro, Hooper and Brazos River Alluvium. I have served as the groundwater hydrology representative for the BVGCD during the statutorily required Groundwater Management Area 12 (GMA 12) planning process for two cycles that span the period from 2007 to 2017.

7. I have served as Project Manager for groundwater study and development projects regarding the Simsboro Aquifer in Burleson, Milam, Robertson, Brazos, Limestone and Freestone counties. These projects span the period from 1978 to the present. I also have managed and been senior technical representative on other groundwater studies regarding the Carrizo-Wilcox in the area extending from the City of Lufkin to the City of San Antonio, Texas.

Summary of Evaluation

8. The Simsboro is a major aquifer that occurs under thousands of square miles in the area north, south, east and west of City of Bryan Well 18 (Bryan Well 18) and the Anthony Fazzino, Jr. property, referred to jointly as the area of interest. In the area of interest, the Simsboro Aquifer occurs in the depth interval from about 2,300 to 2,750 feet below the ground level with about 380 feet of sand in the interval. A graphical description of the aquifer is provided on attached Figure 1, and shows the aquifer occurs under artesian conditions, meaning that the water pressure within the aquifer is enough to force water in the aquifer above the top of the aquifer. The pressure is represented by the static water level inside the well casing, as shown on Figure 1. In the area of interest, the pressure is enough so that the water level in a well screening the aquifer is about 2,000 feet above the top of the aquifer or at a depth of about 200 to 250 feet below land surface. The pumping water level in a large-capacity 3,000 gallon per minute (gpm) well in the area of interest is about 75 to 100 feet deeper than the static water level resulting in the aquifer remaining

under pressure and fully saturated. Large-capacity municipal wells in the area have been providing water at rates of up to about 2,000 to 3,000 gpm for decades.

9. The Fazzino, Jr. property is located within about 0.15 to 0.45 miles of Bryan Well 18, as shown on Figures 1 and 2 and includes about 28.6 acres. The quantity of groundwater in storage beneath the Fazzino, Jr. property is hundreds of millions of gallons. With an aquifer thickness of 380 feet and a sand porosity of 20 to 25 percent, not uncommon for sand, and a land area of 28.6 acres, the estimated amount of water in storage under the land is about 2,160 to 2,700 acre-feet or about 704 to 885 million gallons.

10. The Simsboro Aquifer in the area is under artesian conditions and therefore has a relatively low storage coefficient due to the inelasticity of water and the relatively very small elasticity of the aquifer sand matrix. This means that as the artesian pressure in the aquifer declines due to pumping the amount of water released from storage due to a given change in the artesian pressure in that area is relatively small. In the area of Bryan Well 18 and the Fazzino, Jr. property, well static water-level data collected by the Brazos Valley Groundwater Conservation District (BVGCD) indicates that the artesian pressure (in other words, the water level inside a well casing) has dropped a worse case maximum of about 35 feet since 2007. This pressure decline is mainly due to the pumping of numerous large-capacity municipal wells located in the immediate area. The vast majority of the well static water-level decline resulting from years of pumping occurs during the first few years of pumping. Thus, if pumping in the immediate area remains reasonably constant a limited amount of additional well static water-level decline will occur in future

years. This is because a vast majority of the well static water-level decline or artesian pressure decline occurs as a result of increases in pumping, which is to be differentiated from steady pumping over time resulting in a very limited amount of additional static water-level decline.

11. Pumping of Bryan Well 18 began in 2008. Assuming a worst case maximum 35-foot reduction in artesian pressure and a storage coefficient of 0.0004, the amount of water that would be removed under the 28.6-acre Fazzino, Jr. property since Well 18 pumping began about 9 years ago is about 0.40 acre-feet. Compare that to an amount of water in storage under the land of about 2,160 to 2,700 acre-feet or a reduction in storage of 0.019 to 0.012 percent. Essentially, the pumping by Bryan Well 18 screening the Simsboro Aquifer has not drained water from storage under the Fazzino, Jr. property other than in a de minimis amount.

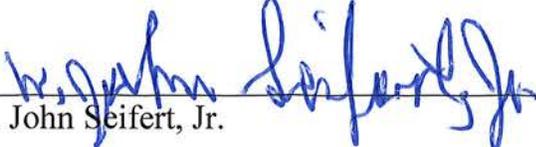
12. For perspective, the recorded pumping from Bryan Well 18 from 2008 through 2016 has averaged about 2,223 acre-feet per year and totaled about 20,000 acre-feet or 6.5 billion gallons while the estimated amount of water removed from storage during this same period under the Fazzino, Jr. property has been about 0.40 acre-feet or 130,000 gallons. The volumetric pumping data for Well 18 were obtained from the BVGCD. Based on these calculations, only 0.002 percent of the approximately 20,000 acre-feet produced from Well 18 has come from under the Fazzino, Jr. property. The remainder of the water comes from reduction of aquifer pressure over a much larger area, recharge, movement between formations and possibly intercepted natural discharge.

13. The flow of groundwater under the Fazzino, Jr. property is moving very slowly from the opposite side of the property, flowing under the property and towards Bryan Well 18. That flow does not result in drainage of water under the Fazzino, Jr. property and represents water that is flowing in the aquifer from areas outside the Fazzino, Jr. property.

14. The Thornhill Group, Inc., a firm owned by Mike Thornhill, prepared a Simsboro Aquifer Impact Assessment Report dated April 14, 2017 regarding a proposed production well for Mr. Anthony Fazzino, Jr. The well has a proposed capacity of approximately 3,000 gpm. In that report, it states that “production from the subject well will not cause depletion of the aquifer, as all water will come from a reduction in artesian pressure”. That finding and statement are contrary to what is provided in the affidavit of Michael R. Thornhill regarding an almost identical well (Bryan Well 18), where he states in his affidavit that production from Bryan Well 18 is “draining” a nearby property. The above described finding in the Thornhill Group report regarding the Fazzino, Jr. proposed well is consistent with my opinion regarding the flow and pumping effects that occur.

Further affiant sayeth not.

SIGNED on this 11 day of October, 2017.


W. John Seifert, Jr.

STATE OF TEXAS

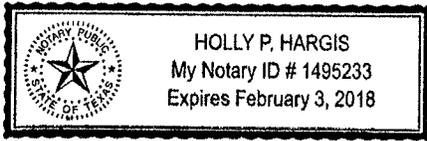
§

COUNTY OF HARRIS

§

§

SUBSCRIBED AND SWORN TO BEFORE ME on this 6th day of October,
2017.



Holly P. Hargis
Notary Public, State of Texas

ATTACHMENTS

WILLIAM JOHN SEIFERT, JR., P.E.
SENIOR PROJECT MANAGER

EDUCATION

B.S. and M.S. in
Agricultural
Engineering, 1973,
Texas A&M University

REGISTRATIONS

Licensed
Professional Engineer
in the State of Texas
No. 49994 – 1981

**TECHNICAL
SOCIETIES**

- American Water Works Association
- American Society of Agricultural Engineers
- Association of Groundwater Scientists and Engineers (National Groundwater Association)
- National Society of Professional Engineers
- Texas Society of Professional Engineers
- Texas Water Conservation Association (Director)



John Seifert's experience includes groundwater availability studies; artificial recharge and recovery; regional water and groundwater conservation district planning and management studies; gold mine dewatering and depressuring and water management projects; planning of test hole drilling programs and monitoring of test hole drilling; design, construction inspection, and testing of public supply water wells, rehabilitation of large-capacity wells and estimation of the

effects of groundwater withdrawals. He has served as Project Manager for studies of the availability of groundwater from the Simsboro, Chicot, Evangeline and Jasper aquifers. He also has participated in projects studying the availability of brackish groundwater from these same aquifers.

He has served as Project Manager on assignments for providing design and construction management services for 1,000 to 3,000 gallons per minute public supply wells. He has directed studies to assembly data for groundwater flow models and to update and recalibrate groundwater models covering multiple counties. He had performed mine dewatering studies in Texas, Nevada, Dominican Republic, Papua New Guinea and Chile. He has directed studies of the possible effects on the fresh groundwater system of the injection of salt or brine water into deep unconsolidated aquifers and of the possible effects of the storage of hazardous waste in a salt dome. He also has managed studies of artificial recharge using wells or spreading basins to recharge water into aquifers. He has conducted studies of specific well problems regarding either the quantity or quality of the water produced and methods for their improvement. He has worked at industrial facilities on RCRA monitoring and on the evaluation of possible remediation of shallow groundwater contamination by wood preserving chemicals. He has presented testimony in administrative proceedings in Texas and Nevada.

SUMMARY OF PROFESSIONAL EXPERIENCE

LBG-Guyton Associates

- 2017 to present: Senior Project Manager and Office Manager, Houston, Texas
- 2003 to 2016: Principal and Office Manager, Houston, Texas
- 1993 to 2002: Senior Associate and Office Manager, Houston, Texas

William F. Guyton Associates, Inc.

- 1985 to 1992: Vice President, Houston, Texas
- 1982 to 1985: Principal, Houston, Texas
- 1973 to 1982: Groundwater Hydrologist, Austin, Texas

WILLIAM JOHN SEIFERT, JR., P.E.
SENIOR PROJECT MANAGER

RELEVANT PROJECT EXPERIENCE

RWC 50, Brazos County, Texas

Performed study of groundwater availability over Brazos and Grimes counties area as part of a multi-entity supported water supply planning study. Study included assessing water availability and water quality from the Carrizo-Wilcox including Simsboro Sand, Queen City, Sparta, Brazos River Alluvium and Yegua aquifers.

Brazos Valley Groundwater Conservation District, Brazos County, Texas

Participate in a study of groundwater resources in Brazos and Robertson Counties. The study included the compilation of hydrogeologic data, well location data, water-level data and water chemistry data for inclusion in a database for the District. The study also included developing objectives for the management goals for the District. Perform ongoing work to address District groundwater resources and management issues. Manage GAM use and develop desired future conditions strategies for the District that were used in GMA 12 planning. Review and assess permit applications for large-capacity wells screening sand of the Sparta or Simsboro aquifers. Manage project for development of 3-D District-wide aquifers model.

NRG, Texas LLC, Limestone Station, Limestone County, Texas

Performed a groundwater availability study for the station with the intent to provide additional water for cooling to be obtained from the Simsboro Aquifer. Obtain data from a three-county area and outline potential areas for further groundwater development. The station currently has a generating capacity of about 1,600 megawatts and has been successfully operating for approximately 22 years. Participated in an initial study of groundwater availability and test drilling for the station prior to the current study which is exploring expanding the station's groundwater supply.

City of College Station, Groundwater Assessment, Brazos County, Texas

Performed a study regarding potential sites for additional large-capacity production wells that would screen sands of the Simsboro aquifer and provide water of a quality acceptable for public supply. Evaluated hydrogeologic data during the assessment and also the rules of the Brazos Valley Groundwater Conservation District as relevant to the assessment. Provided recommendations regarding potential sites for additional production wells that resulted in the construction of a well.

Performed a groundwater availability study regarding the Sparta and Yegua-Jackson aquifers as potential sources of modest amounts of groundwater for the City. Collected and evaluated aquifer data including hydrogeologic, water chemistry, and water-level data from wells to estimate the long-term pumping rate potential for the Sparta and Yegua-Jackson aquifers. As a result of the study, a large-capacity production well was constructed that obtains water from the Sparta aquifer.

Harris-Galveston Subsidence District, Gulf Coast Area, Texas

Performed a study to update and recalibrate a multiple county groundwater flow model for the Chicot and Evangeline aquifers. Collect and areally distribute municipal, industrial, and irrigation pumpage data over the model area. Evaluate aquifers potentiometric head data to review aquifer response to pumpage. Perform recalibration in part of the model area to improve model predicted aquifer response. Total groundwater pumpage in model area was about 400 MGD. Serve as Project Manager for groundwater elements of study leading to revisions to the Districts regulatory plan.

WILLIAM JOHN SEIFERT, JR., P.E.
SENIOR PROJECT MANAGER

Truckee Meadows Water Authority, Reno, Nevada

Provided consulting services regarding groundwater availability, including water quality. Development and testing of five production wells and provided continuing review of well and aquifer response for 15 other production wells withdrawing about 25 mgd. Performed studies regarding artificial recharge using injection wells and spreading basins. Twelve ASR wells are in operation.

Lone Star GCD Planning Study, Montgomery County, Texas

Provide groundwater hydrology services to evaluate the aquifers within the District boundaries. Identify the aquifers and the relative availability of water in District. Perform studies of brackish groundwater resources in certain areas of the District. Perform strategic water planning study including groundwater modeling simulations.

San Antonio Water System, Brackish Groundwater Investigation, Bexar and Atascosa Counties, Texas

Project Manager for the development of contract documents and subsequent construction management for the drilling of test wells and monitoring wells to explore brackish groundwater resources quantity and quality from the Wilcox aquifer. The project included design for the wells and construction management during the drilling, construction and testing phase. The wells were constructed to depths that ranged from about 1,200 to 2,600 feet.

Confidential Client, Brazos and Burleson Counties, Texas

Perform study of the availability of groundwater from the Yegua-Jackson, Sparta, Carrizo and Simsboro aquifers with the use of the water to occur during the completion of wells for oil and/or gas production. Assemble and evaluate electric logs of oil test holes and water wells to define the depth, thickness and general quality of water contained in the various aquifers. Utilize available data to estimate the potential pumping rates that could be obtained from properly constructed and thoroughly developed wells screening one of the four aquifers.

Texas A&M University, Simsboro Wells Pump Replacement, Brazos County, Texas

Perform an assessment of the condition of the wells and pumping equipment installed in wells that provide the water supply to the Texas A&M University. Evaluate available data, test wells, perform video surveys of same, and provide recommendations and specifications for new pumping equipment for the wells. Well rehabilitation was performed as needed and new pumping equipment installed and the wells are providing a significant amount of the supply needed by the University.

PRESENTATIONS

Bennett, Tony, and Seifert, Jr., W. J. (2000, June 30). *MTBE Occurrence Methyl Tertiary Butyl Ether*. Association of Water Board Directors. Austin, Texas

McAlpine, E. K., and Seifert, Jr., W. J. (2009, May 4). *Well Economics: Asset Management Principles and Implementation Strategies*. American Ground Water Trust, Water Well Performance Workshop. Houston, Texas.

Morrison, K., and Seifert, Jr., W. J. (2014, June). *Development of Brackish Groundwater of Brackish Groundwater Desalination Project: SAWS Twin Oaks Brackish Groundwater Desalination Program*. Texas Water Conservation Association Mid-Year Conference.

Seifert, Jr., W. J. (2002, May). *Well Gravel Pack and Screen Design*. Texas Ground Water Association. San Marcos, Texas.

WILLIAM JOHN SEIFERT, JR., P.E.
SENIOR PROJECT MANAGER

Seifert, Jr., W. J. (2010, June 19). *Water Well Rehabilitation and Reconstruction Methods for Water Quality Enhancement*. Association of Water Board Directors. San Antonio, Texas.

Seifert, Jr., W. J. (2011, February 24). *Water Well Rehabilitation and New Well Construction Methods for Water Quality Enhancement*. City of Houston. Houston, Texas.

Seifert, Jr., W. J. (2011, April 30). *Well Gravel Pack and Screen Selection and Well Rehabilitation*. Texas Ground Water Association. New Braunfels, Texas.

Seifert, Jr., W. J. (2013, August 1). *Development of a Sustainable Raw Water Supply*. Southern Central Membrane Association. San Antonio, Texas.

Seifert, Jr., W. J. (2015, June 18). *Groundwater Resources Today and Tomorrow*. Texas Society of Professional Engineers 79th Annual Meeting. Houston, Texas.

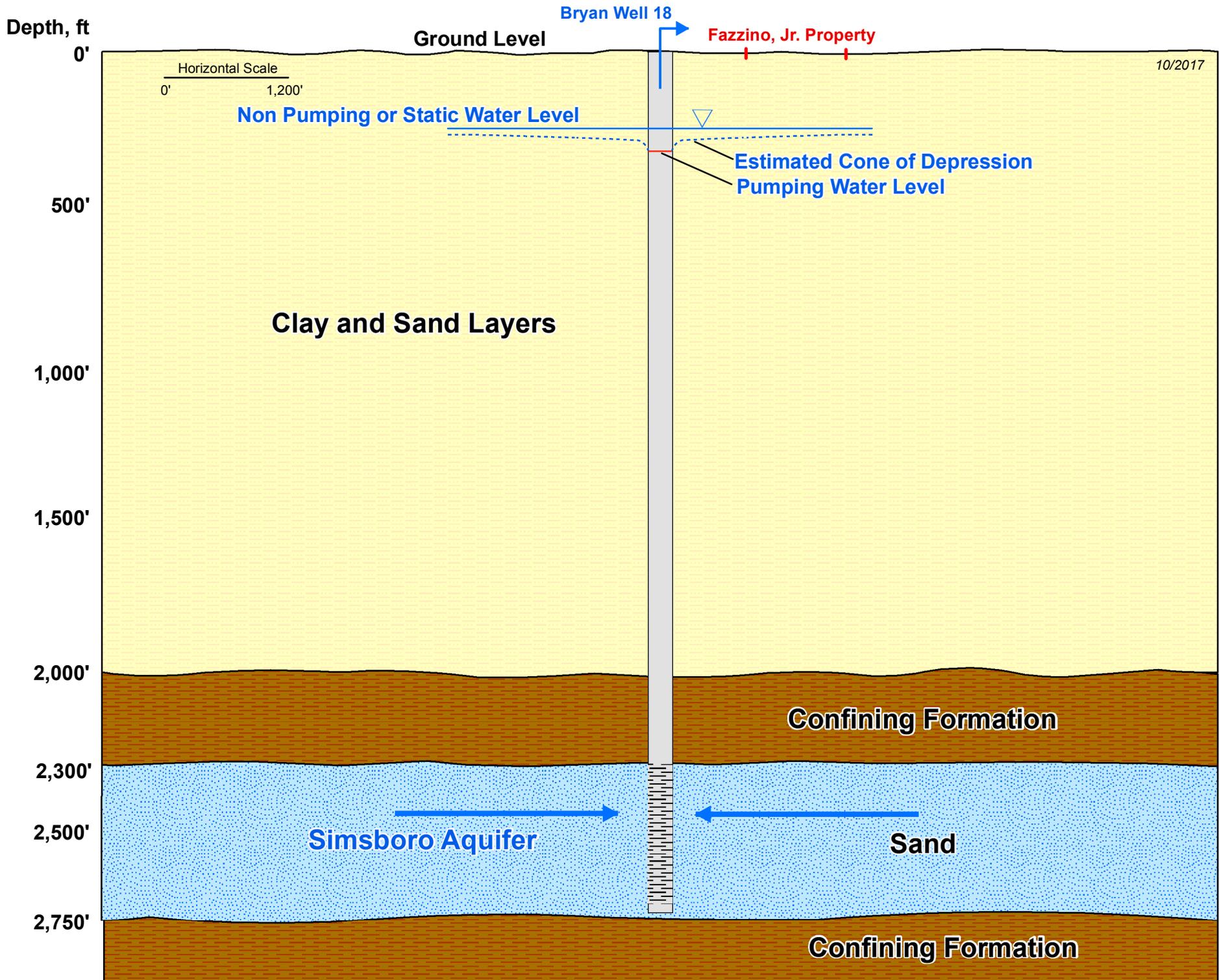
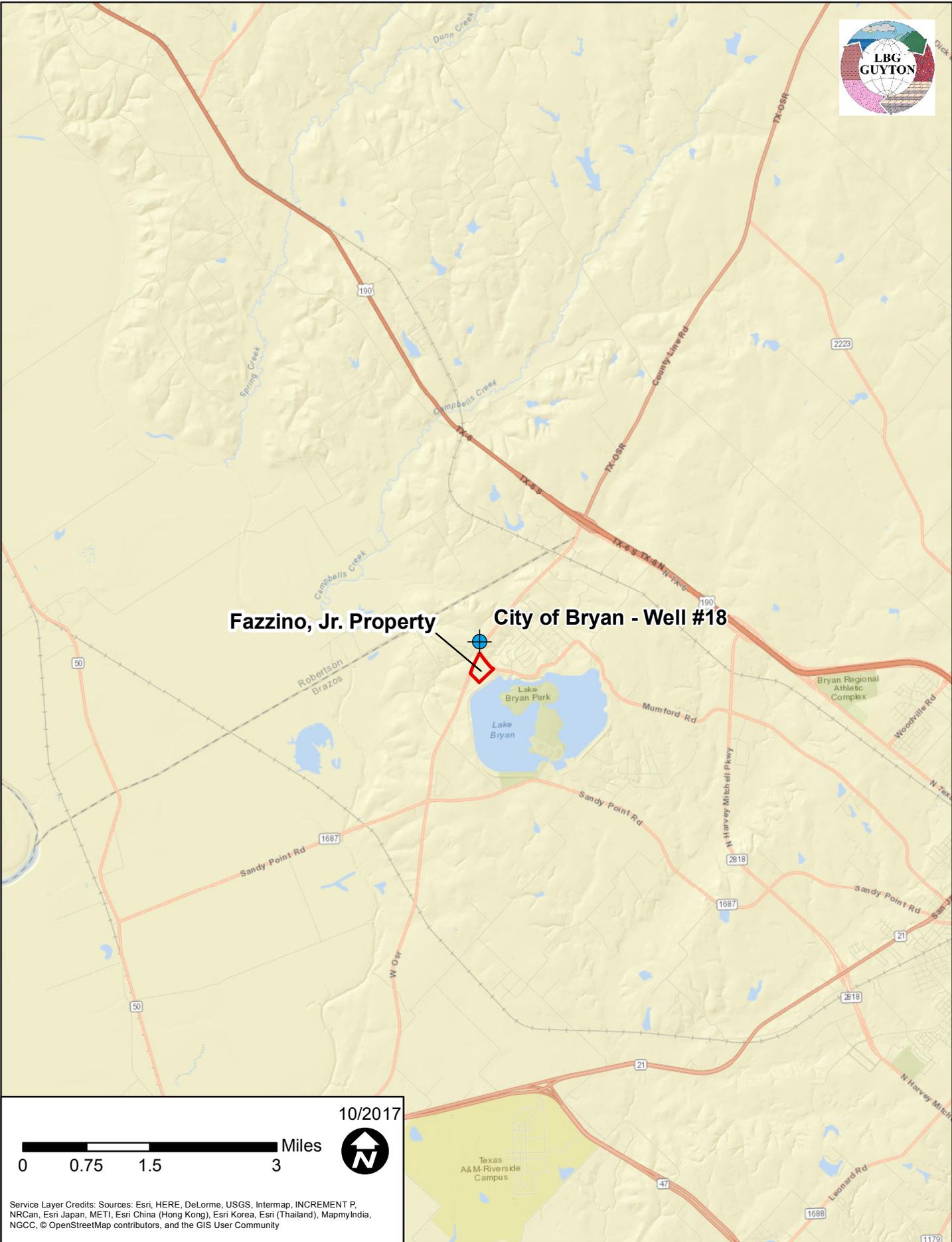


Illustration of Aquifer Conditions In Area of Interest

Figure 1



Fazzino, Jr. Property

City of Bryan - Well #18

10/2017

0 0.75 1.5 3 Miles



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Locations of Features

Figure 2