# NO. 19-0976

## In the Supreme Court of Texas

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**Mountain Pure TX, LLC,**
**Petitioner,**

**v.**

**Neches and Trinity Valleys Groundwater Conservation District,**
**Respondent.**

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*On Petition for Review*
*Twelfth Court of Appeals in Tyler, Texas*
*No. 12-19-00172-CV*

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## PETITION FOR REVIEW

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February 5, 2020

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## STATEMENT OF THE CASE

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| *Nature of Case*: | This is a regulatory action brought by a local groundwater conservation district to regulate and obtain civil penalties, attorneys' fees, and costs against a spring water bottling company. The company counterclaimed, asserting the District's actions exceeded its authority, unreasonably interfered with the existing use of the property by causing the termination of a valuable contract and shutting down operation of the spring, and was a regulatory taking. This appeal arises from the District's claim for immunity from the company's federal and state regulatory takings claims.[1] |
| *Trial Court:* | Hon. R. Chris Day, 2nd Dist. Court, Cherokee County, Texas. |
| *Trial Court Disposition*: | The trial court denied the District's plea to the jurisdiction seeking immunity from the company's regulatory takings claims.[2] |
| *Court of Appeals*: | Twelfth Court of Appeals. Chief Justice Worthen, Justice Hoyle and Justice Bass, ret. (sitting by assignment). |
| *Disposition by Court of Appeals*: | Justice Bass authored the opinion, which reversed the trial court's order denying the District's plea and rendered judgment dismissing Mountain Pure's takings claims. Citing *Carlson*, the court held the District's alleged wrongful exercise of its authority and rules to the property cannot serve as a basis for a regulatory takings claim. The court of appeals remanded the case to the trial court for further proceedings on the District's enforcement action against Mountain Pure, noting the "dispute as to whether the District's rules apply to Mountain Pure's facility remains unresolved."[3] |

[1] 1CR6-11; 3CR349-55; 4CR585-01.
[2] April 18, 2019 Order on Counter-Defendants' Third Plea to the Jur., attached as Tab A; 4CR603.
[3] *Neches and Trinity Valleys Groundwater Conservation Dist. v. Mountain Pure TX, LLC*, __ S.W.3d __, No. 12-19-00172-CV, 2019 WL 4462677 (Tex. App.—Tyler, Sept. 18, 2019, pet. filed), attached as Tab B. The court of appeals' judgment is attached as Tab C.

## STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal because it presents a question of law that is important to the jurisprudence of the state. TEX. GOV'T CODE §22.001(a). Specifically, the Court should resolve the split in the courts of appeals over the proper interpretation of the Court's *Carlson* decision. The Court should resolve whether a temporary takings claim can be based on the government wrongly bringing a regulatory action to enforce property-use restrictions and unreasonably interfering with the landowner's existing and permitted use of property. Texas jurisprudence on regulatory takings should be applied consistently across the state.

## ISSUES PRESENTED

1. Resolving a split of authority over *Carlson*, can a regulatory takings claim be based on the government's intentional but erroneous application of property-use restrictions to a landowner's existing and permitted use of property?

2. Does a temporary regulatory taking occur when the government wrongly brings a regulatory action and unreasonably interferes with the landowner's existing and permitted use of property?

## STATEMENT OF FACTS

### A. Mountain Pure owned a lucrative spring water bottling plant, until the local groundwater district intervened.

Since 2010, Mountain Pure TX, LLC has owned and operated a spring water bottling plant in Palestine, Texas.[4] The property covers almost 42 acres, and includes an onsite natural spring, as well as an industrial building which houses the water treatment facility, offices, and warehouse.[5] As the court of appeals recognized, Mountain Pure's primary expectation for the use of the property was for the bottling of spring water.[6]

Mountain Pure was leasing the property and plant subject to a lease purchase agreement to Ice River Springs Palestine LLC, which was using the property for bottling spring water.[7] Because Mountain Pure provided specialized equipment for, and the property could be used as, a spring water bottling plant, Mountain Pure was able to lease the property to Ice River at a premium—more than double what other industrial leases could obtain in the area. Under the lease, Ice River paid Mountain Pure $9.48 per square foot, while other industrial leases had a market rate of $4.50 per square foot. Under the lease, Ice River paid Mountain Pure annual base rent of over $1 million.[8] The contract included provisions for Ice River to purchase the plant.[9]

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[4] 1CR83.
[5] 1CR83; 4CR490.
[6] Tab B at 7.
[7] 4CR583.
[8] 4CR480.
[9] 3CR351.

The Neches and Trinity Valleys Groundwater Conservation District ("the District") is a local groundwater conservation district created by statute to manage groundwater in Anderson, Cherokee, and Henderson Counties.[10] In 2015, the District's Board of Directors adopted a resolution finding Mountain Pure's operation of the spring water bottling plant in violation of the District's groundwater rules for: (1) not obtaining a permit from the District for a nonexempt well; (2) not filing with the District quarterly groundwater production reports; and (3) failing to pay the District groundwater production fees. The District authorized the filing of this lawsuit against Mountain Pure to seek injunctive relief, civil penalties, attorneys' fees and costs.[11]

In August of 2016, the District filed this lawsuit against Mountain Pure and Ice River, claiming their use of the spring water bottling plant was in violation of the District's groundwater regulations. The District sought injunctive relief requiring Mountain Pure and Ice River to cease operating the facility without metering water, apply to the District within 30 days for permits, submit quarterly reports of all water produced since the start of 2008, and within 30 days pay the District production fees for all water since the start of 2008. The District also sought civil penalties, attorneys' fees and costs. The District claimed to be entitled to assess and be awarded civil penalties of up to $10,000 per day for each alleged violation.[12]

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[10] Tab B, at 1; TEX. WATER CODE §36.0015; TEX. SPEC. DIST. LOCAL LAWS CODE §8863.002.
[11] Apr. 16, 2016 Resolution, attached as Tab D, 1CR96.
[12] 1CR6-11.

Prior to filing suit, the District contacted Ice River and told it a $10,000 per day fine was being assessed for failure to report and monitor the spring water under the District's groundwater rules. Due to that communication, practically overnight, Ice River withdrew from the facility, abandoned operation of the plant, and quit making payments under the terms of its agreement with Mountain Pure. Relying on the District's determination, Ice River asserted Mountain Pure's alleged failure to abide by the District's rules resulted in its right to terminate their agreement.[13] When Ice River terminated the agreement, the District nonsuited and dismissed the claims against it.[14]

Ice River terminated the lease purchase agreement as a direct result of the District's enforcement of its groundwater regulations against the spring water bottling plant.[15] An appraisal found that, as the result of the early termination of the agreement, the property value loss was $5,780,000.[16]

### B. The Parties dispute—still unresolved by the courts—whether the groundwater district has authority to regulate spring water.

Mountain Pure and the District dispute whether the local groundwater district has authority to regulate the spring water bottling plant. As the court of appeals recognized, the dispute as to whether the District has authority to regulate spring water remains unresolved by the courts.[17]

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[13] 3CR351-52.
[14] 1CR19.
[15] 3CR351.
[16] 4CR471-74.
[17] Tab B at 3, 6.

The District is a groundwater conservation district created by statute. Under the Water Code, the District has authority to regulate groundwater.[18] The Water Code defines "groundwater" as, "water percolating under the surface of the earth."[19] Likewise, the District's rules define "groundwater" as "water percolating below the surface of the earth."[20] Each of the rules the District claims authority to enforce against Mountain Pure are based specifically on its authority to regulate groundwater.[21] The District's own rules, as well as the Texas Water Code, limit its enforcement authority to enforcement powers set forth in the Texas Water Code and its rules.[22] Nowhere in the District's rules or the Texas Water Code is the District given specific authority to regulate spring water or surface water.

Mountain Pure's facility bottles spring water and is considered a "Surface Water Treatment Plant" subject to permitting and regulation by the Texas Commission on Environmental Quality.[23] Relative to the bottling of drinking water, the Texas Administrative Code defines "spring water" as, "water derived from an underground formation from which water flows naturally to the surface of the earth."[24] By contrast, the same Code provisions separately define groundwater as "water from a subsurface

[18] TEX. WATER CODE §36.101.
[19] TEX. WATER CODE §36.001(5).
[20] 2CR216.
[21] 1CR7-8 ; 2CR216-17, 220-223.
[22] 2CR235.
[23] 1CR91.
[24] 25 TEX. ADMIN. CODE §229.81(c)(13).

saturated zone that is under a pressure equal to or greater than atmospheric pressure."[25] In order to bottle and sell spring water as drinking water, Pure Mountain is required to pay for and obtain a certificate from the Department of State Health Services and comply with the drinking water standards and rules established by the TCEQ.[26] Nowhere in the Texas Water Code or the District's rules does it specifically authorize spring water to be regulated as groundwater.

### C. The lower courts disagreed as to whether a regulatory takings claim can be based on a government entity acting outside its statutory authority.

In response to the District's lawsuit, Mountain Pure filed a counterclaim, alleging the District tortuously interfered with its contract with Ice River and that its regulation of the plant was a regulatory takings.[27] The District filed a plea to the jurisdiction, claiming immunity from Mountain Pure's counterclaim.[28] The District also filed a motion for partial summary judgment, asking for judgment that Mountain Pure's operation was subject to the District's regulation.[29] The trial court denied summary judgment as to whether the spring water bottling plant was subject to the District's authority.[30] The trial court granted the District's plea as to the tortious interference claim, but denied the plea as to the takings claim.[31]

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[25] 25 TEX. ADMIN. CODE §229.81(c)(8).
[26] 25 TEX. ADMIN. CODE §§229.87(2), -.90.
[27] 2CR145-46.
[28] 1CR105-09.
[29] 1CR22-27.
[30] 1CR104.
[31] 2CR161.

On a subsequent motion, the trial court granted the District summary judgment holding its regulations were facially constitutional (a point not really in dispute), but again denied summary judgment on whether the District's rules apply to Mountain Pure's activities and spring water.[32] The District then filed successive unsuccessful pleas and summary judgment motions seeking immunity from Mountain Pure's takings counterclaim.[33] After the third such plea was denied, the District appealed.[34]

While recognizing the issue of whether the District had authority to regulate Mountain Pure remained unresolved, the court of appeals reversed, holding the District was immune from Mountain Pure's regulatory takings claim.[35] Applying the Court's *Carlson* decision, the court held that a claim the District acted outside of its authority in regulating Mountain Pure was not a valid regulatory takings claim.[36]

[32] 2CR271-72.
[33] 3CR341-45, 356-65; 4CR585-91, 602-603.
[34] Tab A; 4CR603, 605-06.
[35] Tab B at 3, 6-9.
[36] Tab B at 5, 8.

## SUMMARY OF ARGUMENT

An individual landowner should not have to bear the costs of the government's mistakes in interpreting and enforcing property-use regulations. A valid takings claim is alleged when the government brings an improper regulatory action that temporarily shuts down a landowner's existing and permitted use of his property, causing substantial financial loss. By bringing an "as-applied" takings claim, the landowner should be able to place the burden of the government's folly where it correctly belongs.

However, based on conflicting interpretations of the Court's *Carlson* decision, a substantial split of authority has developed in the courts of appeals. One line of Texas authority allows a takings claim, reading *Carlson* at face value to simply hold that a challenge to a procedural regulation does not equate to a regulatory taking when the party objects only to the "infirmity of the process." Another line of Texas authority reaches the opposite result, reading *Carlson* to hold that a regulatory takings claim cannot be alleged based on the government's misapplication of land-use regulations in a way that harms existing property rights. The Court should grant review to resolve this split and provide a unified approach to regulatory takings claims.

## ARGUMENT

### I. The Court should grant review to resolve the split over whether, under *Carlson*, a regulatory takings claim can be based on the government's intentional but erroneous application of property-use restrictions.

Both federal and Texas law recognize a taking occurs when a regulatory action unreasonably interferes with a property owner's right to use and enjoy his property. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 489 (Tex. 2012). While "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penn Cent.*, 438 U.S. at 160. But as both the Court and the Supreme Court recognize, "determining how far is 'too far' has proved to be a problem of considerable difficulty." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004). The Supreme Court has admitted that, "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part). This Court has called these legal battlefields a "sophistic Miltonian Serbonian Bog." *Sheffield,* 140 S.W.3d at 671. Unfortunately, the varied interpretations of the Court's *Carlson* opinion have sunk Texas takings jurisprudence further into the swamp.

In *Carlson*, former condominium owners sued the city and won a judgment that they were denied due process when ordered to vacate their properties which were deemed unsafe. *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014). The owners then brought a second lawsuit, claiming a takings based on the same conduct. *Id.* The

Court held no taking was alleged because the owners raised just a procedural challenge objecting, "only to the penalty imposed and the manner in which the city enforced its standards," and "did not implicate any property-use restriction." *Id.* at 832. Even if the city was ultimately wrong about whether the property was hazardous, no taking was alleged because the owners objected only to an infirmity of the process. *Id.* at 833.

On its face, *Carlson* seems to stand for the unremarkable holding that a regulatory taking claim applies, "only to the regulation of property." *Id.* at 832. But a substantial split of authority has developed over the interpretation of *Carlson* in cases involving the government's intentional but erroneous application of property-use restrictions.

### A. Some courts interpret *Carlson* to allow a takings claim based on the government's wrongful regulatory interference with an existing and permitted land use.

One line of Texas authority applies *Carlson* at face value, holding it merely, "stands for the proposition that a challenge to a procedural regulation does not equate to a regulatory taking when the party objects only to the 'infirmity of the process.'" *Cnty. of El Paso v. Navar*, 511 S.W.3d 624, 631 (Tex. App.—El Paso 2015, no pet.); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 272 n.16 (Tex. App.—Fort Worth 2016, pet. denied). These cases recognize a regulatory takings case can be alleged by challenging the government's application of a land-use restriction to an existing, permissible use of property. *Navar*, 511 S.W.3d at 631-32. Under this interpretation, when "[o]wners are contesting the applicability of the regulation to the [p]roperty, . . . *Carlson* does not control here." *FLCT, Ltd.*, 493 S.W.3d at 272 n.16.

These cases hold a valid *Penn Central* regulatory takings claim is alleged when a property owner claims the government unreasonably interfered with their existing property rights by erroneously applying land-use restrictions contrary to vested rights. *Id.* at 272. This approach is consistent with Texas regulatory takings jurisprudence which recognizes, "a viable inverse condemnation claim can be predicated on the [government's] intentional but erroneous enforcement of an ordinance that interferes with permissible activity by the targeted entity." *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726, 743 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (holding mineral rights owner proved valid regulatory takings claim for city's stop work order based on erroneous application of pollution ordinance).[37]

### B. Some courts interpret *Carlson* to not allow a takings claim based on the government's misapplication of land-use regulations on an existing and permitted use.

Another line of Texas authority applies *Carlson* to reach the opposite result. These cases read *Carlson* to hold that a regulatory takings claim cannot be alleged based on the government's misapplication of land-use regulations in a way that harms existing property rights. *CPM Trust v. City of Plano*, 461 S.W.3d 661, 672-73 (Tex. App.—Dallas 2015, no pet.); *Nat'l Media Corp. v. City of Austin*, No. 03–16–00839–CV, 2018 WL

[37] *See also*, *City of Galveston v. Murphy*, 533 S.W.3d 355, 365 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (holding wrongful application of zoning ordinance to grandfathered property alleged valid takings claim); *Barto Watson, Inc. v. City of Houston*, 998 S.W.2d 637, 641-42 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding city inspector's mistaken shut down order to sand pit operator outside of city limits alleged valid takings claim); *City of Houston v. De Trapani*, 771 S.W.2d 703, 704-05 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (holding city's notice ordering removal of billboard sign based on erroneous interpretation of its sign ordinance alleged a valid takings claim).

1440454, at *5 (Tex. App.—Austin Mar. 23, 2018, no pet.)(mem. op.).[38] In *CPM Trust*, the court specifically noted that, in *Carlson*, this Court did not cite or address *Murphy*, which held a valid regulatory takings claim could be based on a misapplication of a zoning ordinance to existing property. *CPM Trust*, 461 S.W.3d at 673 n.7. As such, the court found the contrary opinion unpersuasive. *Id.*

Here, the court followed *CPM Trust's* reading of *Carlson*, holding Mountain Pure could not allege a takings for the District misapplying the regulations to its property.[39] The court cited language in *Carlson* saying the condominium owners, "appear to suggest that a civil enforcement procedure alone can serve as the basis of a regulatory takings claim."[40] But the *Carlson* owners did "not implicate any property-use restriction,"[41] while Mountain Pure—though not arguing the regulations are facially unconstitutional—is challenging the regulations as applied to their property. The lower court reads *Carlson* to simply hold the government's wrongful attempt to enforce land-use regulations through a civil enforcement action cannot serve as the basis for a regulatory takings.[42]

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[38] In a slightly different twist of alleged facts, in a case involving claims the city intentionally misapplied regulations and treated the owner differently, *Carlson* was relied on to hold that, absent an allegation any regulation was an unreasonable restriction on the use of property, complaints about the "wrongful" application and manner in which regulations were enforced was not a viable takings claim. *APTBP, LLC v. City of Baytown*, No. 14-17-00183-CV, 2018 WL 4427403, at *3-5 (Tex. App.—Houston [14th Dist.] Sept. 18, 2018, no pet.).
[39] Tab B at 6-9.
[40] Tab B at 5, 8; *CPM Trust*, 461 S.W.3d at 673.
[41] *Carlson*, 451 S.W.3d at 832.
[42] Tab B at 5, 8.

## II. A temporary taking should be recognized when the government wrongly brings a regulatory action and unreasonably interferes with the landowner's existing and permitted use of his property.

It is well settled that a regulatory taking arises when the government imposes restrictions that unreasonably interfere with landowners' rights to use and enjoy their property. *Hearts Bluff*, 381 S.W.3d at 489. "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). That test should be met, however, when the government brings an improper regulatory action that temporarily shuts down a landowner's existing and permitted use of his property, causing substantial financial loss.

Whether any given regulatory action has gone "too far" requires the courts to analyze and balance the public's interest with that of the landowner. *Sheffield*, 140 S.W.3d at 671-72. While each case must turn on its own facts, the courts have identified three guideposts: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* Properly applied, each of these guideposts should point to finding a viable takings claim based on the facts alleged by Mountain Pure.

### A. The economic impact of a temporary taking should be measured by the value lost due to the government's interference, not the remaining value.

The District's enforcement action had a severe economic impact on Mountain Pure. The District's actions caused Ice River to withdraw from the lease agreement,

which an appraisal found resulted in a $5,780,000 loss. The court of appeals held the lost rental value should not be considered in determining whether any loss was suffered, and instead focused on the retained value of the property as a whole.[43] This approach ignores the actual economic impact caused by a temporary taking.

The Court has said that, "lost profits are clearly one relevant factor to consider in assessing the value of the property and the severity of the economic impact" of a regulatory action. *Sheffield*, 140 S.W.3d at 677. Moreover, the Supreme Court has rejected the idea that the difference in market value of the property should be used as the basis for damages in a temporary takings, saying instead, "the proper measure of compensation is the rental that probably could have been obtained." *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 6-7 (1949). This Court has likewise said lost rents are the proper measure for and proof of loss in a temporary takings claim. *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978).

For a temporary taking, the lower court's focus on the remainder value of the property at large ignores the actual loss—the lost value of the use of the property during the government's interference. The fact that the District's actions caused Ice River to stop paying rent and withdraw from the lease, as well as caused the bottling plant to shut down production, should be more than sufficient economic impact to allege a temporary takings.

[43] Tab B at 6-8.

### B. Investment-backed expectations should be judged by the government's interference with the current existing and permitted use of property.

The District's actions directly interfered with Mountain Pure's investment-backed expectations for the use of its property. The existing and permitted use of the property are the primary expectation of the landowner in a regulatory takings case. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998). Here, the court recognized, "Mountain Pure's primary expectation concerning the use of the property was the bottling of spring water."[44] The court also acknowledged the District's regulatory enforcement, "would represent a restriction on the property's use."[45] Whether Mountain Pure alleged a viable takings claim should depend on the extent to which the District interfered with the use of the property to bottle spring water.

Instead, the lower court questioned whether Mountain Pure could show the District's proposed regulation would, "significantly diminish its economic viability" going forward. The court thought there was no allegation that the reporting requirement or future imposition of production fees, "will be so onerous as to affect the present use of the property or significantly diminish its economic viability."[46] This analysis ignores that the District also found it was entitled to payment for all spring water bottled since 2008, as well as a fine of up to $10,000 per day for each violation.

[44] Tab B at 7.
[45] *Id.*
[46] *Id.*

This approach also misapplies the analysis for determining interference with investment-backed expectations.

The question for the courts should not be whether the District's proposed future regulatory scheme would be workable, but instead whether the District regulatory actions unreasonably interfered with Mountain Pure's existing investment-backed expectations. An owner's reasonable, investment-backed expectations should be judged against the property-use regulations in place at the time it acquired the property. *Sheffield*, 140 S.W.3d at 677. The issue should be determined by asking how the owner's existing and permitted use of the property was affected by the government's regulatory actions. *Mayhew*, 964 S.W.2d at 936.

Under the current regulatory scheme, Mountain Pure has the right to bottle its spring water without facing fines, fees, and regulation from the local groundwater district. Spring water has long been held to be the exclusive property of the land owner. *Tex. Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927). The authority to establish or change the regulation of natural resources, including water, rests solely with the Legislature. *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 77 (Tex. 1999). Administrative bodies, such as the District, only have the powers conferred on them by clear and express statutory language or implied powers that are reasonably necessary to carry out the Legislature's intent. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 640 (Tex. 2013). The Legislature has only given the District authority to regulate and bring enforcement actions for groundwater. TEX. SPEC. DIST. LOCAL LAWS CODE §8863.101.

Had the Legislature intended to give the District authority to regulate spring water, it clearly knows how to do so. *See, e.g.*, TEX. SPEC. DIST. LOCAL LAWS CODE §8503.029 (giving Lower Colorado River Authority additional specific powers including over surface water). Instead, the Legislature limited the District's authority to groundwater, and specifically precluded the District from exercising eminent domain power. TEX. SPEC. DIST. LOCAL LAWS CODE §8863.104. Under the current regulatory system, a spring water bottling company is certified through the Department of Health Services, and is regulated by the TCEQ. 25 TEX. ADMIN. CODE §§229.87, -.90. Mountain Pure had an investment-backed expectation to continue bottling spring water on its property without interference from the District.

Even if the District was given authority moving forward to regulate spring water, that would still be a taking. The courts have recognized the government's regulation of groundwater that was previously unregulated is an interference with the owner's investment-backed expectations. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 142 (Tex. App.—San Antonio 2013, pet. denied). And the Court has held government regulation of groundwater can state a viable takings claim, the merits of which should be decided on resolution of the disputed facts. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 839-43 (Tex. 2012). There is no reason takings law should be any different for spring water.

### C. With its authority unresolved, the character of the District's actions support Mountain Pure's regulatory takings claim.

As the lower court recognized, the question as to the District's authority to regulate Mountain Pure's spring water remains unresolved.[47] When the government takes regulatory action that could not be enforced against the target, that conduct supports a fact question as to whether the government's actions constitute a takings under *Penn Central*. *City of Lorena*, 409 S.W.3d at 646. The lower court took the opposite approach here, believing that because the District's regulatory lawsuit remained pending, "[n]o restrictions, rules, or regulations affecting it have so far been applied to the property."[48] But the law does not require Mountain Pure to wait on the courts to allege the District's actions constitute a takings.

Mountain Pure's takings claim against the District was ripe when the board of directors passed its 2015 resolution and filed this lawsuit. A takings claim challenging the application of land-use regulations is ripe when the government entity charged with implementing the regulations has issued a final decision regarding the application of the regulations to the property at issue. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). There is no basis to allow the government to avoid a takings claim while seeking to prohibit the target from exercising their property rights long enough to obtain a judicial determination. *Yuba Goldfields, Inc. v. U.S.*, 723 F.2d 884, 888 (Fed. Cir. 1983). The

[47] Tab B at 3, 6.
[48] Tab B at 8.

government can acquiesce to a judicial determination as to its conduct as a taking, but doing so simply has the effect of rendering it a "temporary" taking, and limiting the compensation due. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 317-18 (1987).

If the courts determine the District exceeded its authority when it brought this regulatory action against Mountain Pure that is exactly the type of conduct supporting a regulatory takings. "At the heart of the takings clause lies the premise that the government should not force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004). There is no reason an individual landowner should bear the costs of the government's mistakes.

## PRAYER

For these reasons, Mountain Pure asks the Court to grant the petition, reverse the court of appeals, and remand the case for a determination on the merits. Mountain Pure further asks for any other relief to which it might be entitled.

Dated: February 5, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this petition contains 4,331 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Kurt Kuhn
Kurt Kuhn

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this petition on counsel of record by electronic service in accordance with the Texas Supreme Court's rules on electronic filing, on February 5, 2020, as listed below:

John D. Stover
jstover@skeltonslusher.com
SKELTON SLUSHER BARNHILL WATKINS WELLS, PLLC
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Lufkin, Texas 75901

*Counsel for Respondent*

/s/ Kurt Kuhn
Kurt Kuhn

## APPENDIX

# Tab A

IN THE 2ND DISTRICT COURT
OF CHEROKEE COUNTY
STATE OF TEXAS

| | | |
|---|---|---|
| NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT, Plaintiff | § | |
| VS. | § | CAUSE NO. 2016-08-0543 |
| MOUNTAIN PURE TX, LLC Defendant | § | |

**ORDER ON COUNTER-DEFENDANTS' THIRD PLEA TO THE JURISDICTION**

On April 9, 2019, came on to be heard the Third Plea to the Jurisdiction filed by Neches and Trinity Valleys Groundwater Conservation District ("District") and the individual members of its Board of Directors, Gary Douglas, Sam Hurley, Donald Foster, Jimmy Terrell, Julianna Peacock, Tim Perry, Terry Morrow, Counter-Defendants in the above entitled and numbered cause.

All parties were given timely notice of the hearing. After examining the pleadings filed, the Third Plea to the Jurisdiction, any responses and replies thereto, and the arguments of counsel, the Court orders that the Third Plea to the Jurisdiction is DENIED.

SIGNED this 18th day of April, 2019.

Judge Presiding

ND:4838-9530-6330 v.1

**FILED**
**ALISON DOTSON**
Clerk, District Court
Cherokee County, Texas

***By KELLY CURRY at 12:08:37 PM, 4/24/2019***

# Tab B

# NO. 12-19-00172-CV

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

| | | |
|---|---|---|
| ***NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT, APPELLANT*** | ***§*** | ***APPEAL FROM THE 2ND*** |
| | ***§*** | ***JUDICIAL DISTRICT COURT*** |
| ***V.*** | | |
| ***MOUNTAIN PURE TX, LLC, APPELLEE*** | ***§*** | ***CHEROKEE COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

This is an accelerated appeal from the district court's denial of Neches and Trinity Valleys Groundwater Conservation District's plea to the jurisdiction alleging governmental immunity. In three issues, the District challenges the denial of its plea to the jurisdiction and its no evidence motion for partial summary judgment. Because we conclude that Mountain Pure TX, LLC's counterclaim against the District is barred by governmental immunity, we reverse the order of the trial court, render judgment dismissing Mountain Pure's counterclaim, and remand the cause to the trial court for further proceedings consistent with this opinion.

## BACKGROUND

The District is a groundwater conservation district charged with the duty to conserve, preserve, and prevent waste of groundwater in Cherokee, Anderson, and Henderson Counties.[1] Its powers also include the authority to make and enforce rules.[2] Its rules require all persons owning a groundwater well to obtain permits to drill and operate the well unless exempt under the

[1] TEX. WATER CODE ANN. § 36.0015(b) (West 2018); TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8863.002.

[2] TEX. WATER CODE ANN. §§ 36.101(a), 36.102 (West 2018).

provisions of Chapter 8863 of the Texas Special District Local Laws. Chapter 8863.151 permits the District to assess production fees.[3] Chapter 8863.103 permits the District to require a permit for the transfer of groundwater out of the district.[4]

Mountain Pure owns a spring water bottling plant in Palestine, Texas. Mountain Pure refused to acknowledge that it owns or operates a water well, refused to apply for a permit to operate a water well, refused to apply for the transfer of water out of the district, and failed to file quarterly production reports or pay quarterly production fees. Mountain Pure maintained that the water it bottled and sold did not come from a water well, but from an "underground formation from which water flows naturally to the surface of the earth." It is Mountain Pure's position that the District therefore has no authority to regulate spring water.

The District, claiming that Mountain Pure was drawing water from a well under its authority, filed suit against Mountain Pure and Ice River Springs Palestine, LLC to force their compliance with the Texas Water Code and the District's rules. The District asked the trial court to order Mountain Pure and Ice River to (1) submit to the District within thirty days applications for operating permits for all of their wells; (2) submit to the District within thirty days written reports stating the amount of groundwater produced from their wells for all quarters beginning with the first quarter of 2008; (3) cease from operating nonexempt wells in Anderson County without accurately metering the amount of water produced; (4) accurately report the amount of water produced from all of its wells to the District on a quarterly basis; and (5) pay to the District within thirty days all production fees due as determined by the quarterly reports required. The suit also asked for reasonable costs, attorney fees, and the assessment of civil penalties. Ice River, a tenant of Mountain Pure, was subsequently dismissed from the case.

Mountain Pure generally denied the District's allegations and filed a counterclaim alleging that the District's enforcement attempts constituted tortious interference with their lucrative operating contract with Ice River. In its counterclaim, Mountain Pure stated that prior to the District's filing suit, Ice River contracted to purchase the facility. Ice River was also operating the facility and making substantial payments to Mountain Pure. Mountain Pure alleged that before filing suit, the District informed Ice River "that a $10,000 per day fine was being assessed because

[3] TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8863.151(c).

[4] TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8863.103(b).

of an unreported and unmonitored water well that was drilled on the property. Mountain Pure further alleged "[a]s a result of this communication, Ice River Springs Palestine, LLC practically overnight withdrew from the facility and abandoned operation of the plant and quit making payments under the terms of the written agreement." Mountain Pure alleged that the District, by its actions, tortiously interfered with its contract with Ice River which resulted in $10,000,000 in damages to Mountain Pure from lost earnings and/or lost earning capacity, lost profits, and diminished market value.

In its First Amended Counterclaim, in addition to the tortious interference claim, Mountain Pure alleged a general takings claim based on the same facts and same damages as the tortious interference claim. The trial court granted the District's plea to the jurisdiction as to the tortious interference claim but denied its plea to the jurisdiction as to the takings claim.

In its Sixth Amended Counterclaim, Mountain Pure contended that the District's attempted regulation caused Ice River's withdrawal from the contract to operate the facility for Mountain Pure, denied access to the property, and caused a cessation of operations. The nature and amount of the damages are the same as those formerly claimed.

The District, in its Third Plea to the Jurisdiction, maintained that Mountain Pure simply complained about the District enforcing its regulations and failed to allege a takings claim. The trial court denied the District's plea to the jurisdiction. The District appealed the interlocutory order.

No rules or restrictions have as yet been imposed on Mountain Pure or its property and the question of the District's authority over the source of Mountain Pure's water remains pending before the trial court.

## PLEA TO THE JURISDICTION

In two issues, the District claims the trial court erred in not granting its plea to the jurisdiction and dismissing Mountain Pure's counterclaim. In a third issue, the District contends the trial court erred in denying its no evidence motion for partial summary judgment.

### Standard of Review

Subject matter jurisdiction is essential to the authority of a court to decide a case. ***Tex. Ass'n of Bus. v. Tex. Air Control Bd.***, 852 S.W.2d 440, 443 (Tex. 1993). A challenge to subject matter jurisdiction presents a question of law. ***Tex. Dep't of Parks & Wildlife v. Miranda***, 133

S.W3d 217, 226 (Tex. 2004). Therefore, we review the trial court's ruling on a plea to the jurisdiction de novo. ***Mayhew v. Town of Sunnyvale***, 964 S.W.2d 922, 928 (Tex. 1998). In reviewing a plea to the jurisdiction, we review the pleadings and any evidence relevant to the jurisdictional issue. *See* ***Tex. Dep't of Criminal Justice v. Miller***, 51 S.W.3d 583, 587 (Tex. 2001). We accord the trial court's decision no deference. ***Quick v. City of Austin***, 7 S.W.3d 109, 116 (Tex. 1998). The plaintiff's pleadings are construed liberally in the plaintiff's favor. ***Miranda***, 133 S.W3d at 226. But it is the factual substance of the pleadings (as supported by the jurisdictional evidence) that is controlling when we review the trial court's ruling on a plea to the jurisdiction. ***Nat'l Media Corp. v. City of Austin***, No. 03-16-00839-CV, 2018 WL 1440454 at *5 (Tex. App. – Austin Mar. 23, 2018, no pet.) (mem. op.) (citing ***Andrade v. NAACP of Austin***, 354 S.W.3d 1, 11 (Tex. 2011)).

**Applicable Law**

Under the doctrine of sovereign immunity, the State of Texas cannot be sued in its own courts without its consent and then only in the manner indicated by that consent. ***Wichita Falls State Hosp. v. Taylor***, 106 S.W.3d 692, 694 (Tex. 2003). Absent the State's consent to suit, a trial court lacks subject matter jurisdiction. ***Tex. Dep't of Transp. v. Jones***, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). "Sovereign immunity does not shield the government from liability for compensation under the takings clause." ***Harris Cty. Flood Control Dist. v. Kerr***, 499 S.W.3d 793, 799 (Tex. 2016). Governments must sometimes impose restrictions on and regulations affecting the use of private property in order to secure the safety, health, and general welfare of its citizens. *See* ***City of Houston v. Carlson***, 451 S.W.3d 828, 831 (Tex. 2014). Although those restrictions and regulations sometimes result in inconvenience to owners, the government is not generally required to compensate for accompanying loss. ***Id***. But when regulation of private property reaches a certain level there must be an exercise of eminent domain and compensation to sustain that act. ***Id***. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." ***Pennsylvania Coal Co. v. Mahon***, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 2d 322 (1922). Where a property owner believes compensation is due, he may seek redress via an inverse condemnation claim. ***Carlson***, 451 S.W.3d at 831; ***State v. Hale***, 136 Tex. 29, 146 S.W.2d 731, 735 (1941).

The Texas Constitution waives sovereign immunity with regard to inverse condemnation claims. ***Carlson***, 451 S.W.3d at 830. Such claims must be predicated upon a viable allegation of

a taking. ***Id***. Absent a properly pleaded takings claim, the government retains immunity, and a court must sustain a properly raised plea to the jurisdiction. ***Id***.

A taking is the acquisition, damage, or destruction by physical or regulatory means. ***Id***. at 831; ***Mayhew***, 964 S.W.2d at 933. A physical taking occurs when the government authorizes an unwarranted physical occupation of a person's property. ***Mayhew***, 964 S.W.2d at 933.

A compensable regulatory taking may occur in one of two ways. First, a regulatory taking can occur when governmental agencies impose restrictions that deny landowners all economically viable use of their property. ***Id***. at 935. A restriction denies the landowner all economically viable use of the property if the restriction renders the property valueless. ***Id***. Second, a regulatory taking can occur if the restrictions imposed unreasonably interfere with the landowners' right to use and enjoy the property. ***Id***.

In determining whether the government unreasonably interfered with an owner's right to use and enjoy the property, two factors must be considered: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment backed expectations. ***Id***. "The first factor, the economic impact of the regulation, merely compares the value that has been taken from the property with the value that remains in the property." ***Id***. at 935-36. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. ***Id***. at 936. The second factor is the reasonable investment-backed expectation of the landowner. ***Id***. "The existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation." ***Id***.

A civil enforcement procedure alone cannot serve as the basis of a regulatory takings claim. ***Carlson***, 451 S.W.3d at 832-33; ***CPM Trust v. City of Plano***, 461 S.W.3d 661, 673 (Tex. App.– Dallas 2015, no pet.).

A denial of access is compensable if the denial of access is substantial and material. *See* ***City of Houston v. Texan Land and Cattle Co***., 138 S.W.3d 382, 387 (Tex. App.– Houston [14th Dist.] 2004, no pet.). In order to show substantial and material impairment of access, the owner must establish (1) a total temporary restriction of access, (2) a partial permanent restriction of access, or (3) a partial temporary restriction of access due to illegal or negligent activity. ***State v. Schmidt***, 867 S.W.2d 769, 775 (Tex. 1993); ***Texan Land and Cattle Co***., 138 S.W.3d at 387.

**Discussion**

Mountain Pure does not contend that the District's rules and regulations it seeks to enforce are unconstitutional or otherwise invalid. But it maintains that the District is wrongfully attempting to apply them to its property. Mountain Pure claims the spring catch basin from which it derives the water to be bottled and sold is not a water well within the purview of the District's rules and the water taken from the basin is not groundwater subject to the District's rules. The dispute as to whether the District's rules apply to Mountain Pure's facility remains unresolved. Therefore, as yet, no rules or restrictions have been imposed on Mountain Pure or its property.

However, in its counterclaim, Mountain Pure claims a permanent taking occurred when the District filed suit against it and its tenant and operator, Ice River, to enforce its regulations applicable to groundwater. The District's rules required the reporting of the amount of groundwater produced and the payment of a production fee in the amount of three cents for every 1000 gallons shipped out of the District. Failure to pay the production fee results in fines, such as the fine of up to $10,000 per day assessed against Mountain Pure. This initial step in the enforcement process, Mountain Pure asserts, caused Ice River to withdraw from a lucrative contract with Mountain Pure to use and operate the spring. The loss of this contract, it argues, resulted in the cessation of operations at the spring, and the loss of a minimum of $10,000,000.

Mountain Pure does not dispute that the District has governmental immunity but contends that under the Fifth Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution, the District is not shielded against a properly pled takings claim. When a property owner believes the government's conduct amounts to a taking for which he is entitled to compensation, he may file an inverse-condemnation claim. ***Carlson***, 451 S.W3d at 831; ***Hale***, 146 S.W.2d at 735. Takings can be either physical or regulatory takings. ***Mayhew,*** 964 S.W.2d at 933.

Mountain Pure maintains that the District's suit resulted in a permanent regulatory taking by unreasonably interfering with its right to use and enjoy its property. The record shows that Mountain Pure's Palestine plant, after the government action, retains a value of $4,090,000. Mountain Pure cannot contend that the District's action renders its property valueless. Mountain Pure obviously cannot claim a regulatory taking by claiming the District's actions would take "all economically viable use of its property by rendering it valueless.

As previously stated, two factors must be considered in determining whether the government-imposed restrictions constitute a regulatory taking by unreasonably interfering with the landowners rights to use and enjoy their property. ***Id***. The economic impact of the regulation on the property is the first factor. This merely compares the value that has been taken from the property with the value that remains in the property. ***Id***. at 936. The loss of anticipated gains or future profits is not usually considered in this analysis. ***Id***. Mountain Pure s spring and related facilities retain a value, according to its appraiser, of $4,090,000. Mountain Pure s pleadings and the jurisdictional evidence indicate that the loss it claims to the value of its property is the result of the loss of future gains from its lost contract with Ice River. The appraiser s report Mountain Pure submitted in its response to the District s plea to the jurisdiction and motion for summary shows a total value loss of $5,780,000 attributable to the early lease termination by Ice River.

The second factor to be considered is the extent to which the regulation interferes with the investment-backed expectation of the landowner. ***Id***. The existing and permitted uses of the property constitute the primary expectation of the landowner affected by regulation. ***Id***. (citing ***Penn Cent. Transp. Co. v. City of New York***, 438 U.S. 104, 136, 98 S. Ct. 2646, 2665, 57 L. Ed. 631 (1978)). There is no pleading or evidence that Mountain Pure has pleaded or shown that the application of the groundwater rules, should they be held to apply, will interfere with production and sale of bottled water from the property. If the District is successful, the enforcement of the production reporting rules would represent a restriction on the property s use. There is no pleading that the imposition of a three cent per 1000 gallons fee will be so onerous as to affect the present use of the property or significantly diminish its economic viability. Even if it could be conceded that the application of the District s rules and regulations might affect the potential attractiveness of the property, the United States Supreme Court has observed neither a diminution in property value nor a substantial reduction of the attractiveness of the property to potential purchasers will suffice to establish that a taking has occurred. ***Exposito v. S. Carolina Coastal Council***, 939 F.2d 165, 170 (4th Cir. 1991) (quoting ***Kirby Forest Indus. v. United States***, 467 U.S. 1, 15, 104 S. Ct. 2187, 2196, 81 L. Ed. 2d 1 (1984)).

Mountain Pure s primary expectation concerning the use of the property was the bottling of spring water. Neither the District s rules nor its attempt at their enforcement has deprived Mountain Pure of any reasonable investment backed expectation. There is no showing that the enforcement of the reporting rules and the accompanying three cent per thousand-gallon fee will

affect production. Mountain Pure retains the right to occupy the property, to exclude others from it, to continue to operate the spring on the property, or to alienate it should it choose. The current industrial use is permissible and there are no known private or other restrictions limiting the use of the property according to Mountain Pure's appraiser's report. An analysis of the pleadings and jurisdictional evidence under this factor fails to show a regulatory taking.

Mountain Pure's appraiser showed the property is presently worth $4,090,000. Mountain Pure has simply pleaded that because of the District's threat to enforce its rules, Ice River withdrew from its contract to operate the facility. Its appraiser's report shows that this resulted in a $5,780,000 loss attributable to Ice River's decision to withdraw from the lease according to Mountain Pure's appraisers. Its claim that the District is wrongfully attempting to misapply its rules to Mountain Pure's spring demonstrates that the District's suit is a civil enforcement action. A civil enforcement action alone cannot serve as the basis of a regulatory takings claim. *See* ***Carlson***, 451 S.W.3d at 832-33; *see also* ***CPM Trust***, 461 S.W.3d at 673.

There are assertions in Mountain Pure's pleadings that the District denied access to the property and caused a cessation of operations. Mountain Pure's pleadings do not contain facts that allege a compensable denial of access, nor do they show how the District's suit forced a cessation of operation. Ice River's termination of its lease purchase operating agreement may have been influenced by the District's civil enforcement suit. But there are no facts pleaded to show it was required by the District's action. The District's suit neither denied access to the spring nor prevented its operation. No restrictions, rules, or regulations affecting it have so far been applied to the property. Mountain Pure's pleadings and the facts in the record show that the damage claims relate solely to their loss of the "above market" contract with Ice River. They allege the same facts and damages as Mountain Pure's dismissed tortious interference claim with a conclusory takings claim appended. It is impossible to avoid the conclusion that Mountain Pure's inverse condemnation claim is no more that its dismissed tortious interference claim thinly disguised as a taking.

While Mountain Pure's pleadings recite that the District's actions effectuated a total regulatory taking by unreasonably interfering with Mountain Pure's use and enjoyment of the property, it is the facts pleaded and supported by the jurisdictional evidence that is controlling. Natl Media Corp. 2018 WL 1440454, at *5 (citing ***Andrade***, 345 S.W.3d at 11). The facts pleaded fail to show a taking.

For the above reasons, we conclude the trial court erred by denying the District's plea to the jurisdiction. We sustain issues one and two. Our disposition of the District's first two issues renders it unnecessary that we address the District's third issue. *See* TEX. R. APP. P. 47.1.

## DISPOSITION

Because the trial court erred in denying the District's plea to the jurisdiction and motion to dismiss Mountain Pure's counterclaim, we ***reverse*** the trial court's order of denial, ***render*** judgment dismissing Mountain Pure's takings claim against the District, and ***remand*** the cause to the trial court for further proceedings consistent with this opinion.

**BILL BASS**
Justice

Opinion delivered September 18, 2019.
*Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired, J., Twelfth Court of Appeals, sitting by assignment.*

(PUBLISH)

# Tab C

# COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

# JUDGMENT

**SEPTEMBER 18, 2019**

**NO. 12-19-00172-CV**

**NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT,**
Appellant
V.
**MOUNTAIN PURE TX, LLC,**
Appellee

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Appeal from the 2nd District Court
of Cherokee County, Texas (Tr.Ct.No. 2016-08-0543)

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THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the order of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the order of the trial court be **reversed,** Mountain Pure's counterclaim be **dismissed,** and the cause be **remanded** to the trial court **for further proceedings** and that all costs of this appeal are hereby adjudged against the Appellee, **MOUNTAIN PURE TX, LLC,** in accordance with the opinion of this court; and that this decision be certified to the court below for observance.

Bill Bass, Justice.
*Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.*

# Tab D

RESOLUTION OF THE NECHES AND TRINITY VALLEYS
GROUNDWATER CONSERVATION DISTRICT
AUTHORIZING ENFORCEMENT AGAINST
MOUNTAIN PURE TX, LLC; AND
ITS SUCCESSOR OWNERS AND OPERATORS

RESOLUTION 20150416

WHEREAS, the Board of Directors of the Neches and Trinity Valleys Groundwater Conservation District, at this duly noticed and called meeting, and within a quorum of members present, considered the matter of Mountain Pure TX, LLC; and finds the following:

1. Mountain Pure TX, LLC has failed to obtain a permit for non-exempt wells that it owns and operates;
2. Mountain Pure TX, LLC has failed and continues to fail to provide quarterly production reports as required by the Texas Water Code and District Rules;
3. Mountain Pure TX, LLC has failed and continues to fail to pay production fees as authorized by law and required by District Rules;

NOW, THEREFORE, BE IT RESOLVED THAT, the legal counsel for the District, John D. Stover, is authorized to file suit in the District Court of Cherokee, Anderson, or Henderson Counties against Mountain Pure TX, LLC; to enforce the District Rules by seeking an injunction, mandatory injunction, or other appropriate remedy including civil penalties, reasonable attorneys' fees, expert witness fees, and other cost incurred by the District.

Signed this 16th day of April, 2015.

Board President

ND: 4839-5074-1283, v. 1