

NO. 15-08-08942

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| CITY OF CONROE, TEXAS; | § | IN THE DISTRICT COURT |
| QUADVEST, L.P., d/b/a QUADVEST | § | |
| WATER AND SEWER UTILITY; | § | |
| WOODLAND OAKS UTILITY, L.P.; | § | |
| CRYSTAL SPRINGS WATER CO., | § | |
| INC., d/b/a CRYSTAL SPRINGS WATER | § | |
| AND SEWER UTILITY; EVERETT SQUARE, | § | |
| INC.; E. S. WATER CONSOLIDATORS, | § | |
| INC.; UTILITIES INVESTMENT CO., | § | |
| INC.; and T&W WATER SERVICE | § | |
| COMPANY | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | |
| | § | |
| RICHARD J. TRAMM, SAM W. BAKER, | § | Montgomery County - 284th Judicial District Court |
| M SCOTT WEISINGER P.G., | § | |
| JIM STINSON, P.E., JOHN D BLEYL, P.E., | § | MONTGOMERY COUNTY, TEXAS |
| JACE HOUSTON, ROY MCCOY, JR., | § | |
| RICK MOFFATT, W. B. WOOD, in | § | |
| their Official Capacities as Directors of the | § | |
| Lone Star Groundwater Conservation District; | § | |
| KATHY TURNER JONES, in her | § | |
| Official Capacity as General Manager of | § | |
| the Lone Star Groundwater Conservation | § | |
| District; and the LONE STAR GROUNDWATER | § | |
| CONSERVATION DISTRICT, | § | |
| | § | |
| Defendants. | § | _____ JUDICIAL DISTRICT |

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs the City of Conroe, Texas; Quadvest, L.P., d/b/a Quadvest Water and Sewer Utility; Woodland Oaks Utility, L.P.; Crystal Springs Water Co., Inc., d/b/a Crystal Springs Water and Sewer Utility; Everett Square, Inc.; E. S. Water Consolidators, Inc.; Utilities Investment Co., Inc.; and T&W Water Service Company (hereinafter "Plaintiffs") file this, their Original Petition against Richard J. Tramm, Sam W. Baker, M Scott Weisinger P.G., Jim

Stinson, P.E., John D Bleyl, P.E., Jace Houston, Roy McCoy, Jr., Rick Moffatt, and W. B. Wood, in their official capacities as members of the Board of Directors of the Lone Star Groundwater Conservation District; Kathy Turner Jones, in her official capacity as General Manager of the Lone Star Groundwater Conservation District, and the Lone Star Groundwater Conservation District (hereinafter “Defendants”), and in support thereof would show as follows:

I. INTRODUCTION

It is regrettable that Plaintiffs must file this suit for judicial relief. But the individual Defendants, purportedly acting under color of their official capacities as Directors and the General Manager of the Lone Star Groundwater Conservation District, and the Lone Star Groundwater Conservation District (“the District”) are threatening, effective January 1, 2016, to take and damage Plaintiffs’ property rights in groundwater by seeking to impose production limitations on Plaintiffs and other large volume groundwater users in Montgomery County, Texas, that are beyond Defendants’ lawful, statutory authority. Using the proper legal term, Defendants are threatening to take *ultra vires* actions that will harm Plaintiffs and Plaintiffs’ protected property rights in groundwater.

More specifically, the individual Defendants, acting in their official capacities, and the District are threatening to implement and enforce severe production restrictions that are imposed on groundwater users, including Plaintiffs, that purport to have been adopted, under color of the District’s statutory authority. But those restrictions on users are not lawful means for regulating groundwater authorized by the TEXAS WATER CODE and the Constitution of the State of Texas. The restrictions are beyond the statutory authority of the District and are, consequently, invalid.

Certain of the Plaintiffs have brought this matter to Defendants’ attention on several occasions and have asked Defendants to cease and desist from attempting to regulate using *ultra*

vires means, but Plaintiffs' requests have been unheeded. Consequently, Plaintiffs have no recourse available except to seek the relief that is available to them from this Honorable Court.

II. DISCOVERY LEVEL

Discovery in this action should proceed under Level 3 pursuant to TEX. R. CIV. P. 190.4.

III. THE PARTIES TO THIS LAWSUIT

A. Plaintiffs

The Plaintiffs in this lawsuit are governmental and privately-owned entities that own groundwater rights in Montgomery County, Texas, and produce groundwater in Montgomery County:

(1) **The City of Conroe, Texas**, ("Conroe"). Conroe is a home-rule city operating under its municipal charter pursuant to Article 11, Section 5 of the Texas Constitution. Conroe is located within Montgomery County, and is the largest municipality in Montgomery County. Conroe's Mayor and City Council are responsible for providing an array of municipal services to Conroe's rapidly-growing population. One of the most significant of those services is municipal water service. Conroe owns water rights and has municipal well fields, as well as a very substantial water distribution system that provides household, business and industrial, and fire protection water to its citizens.

Concluding that filing this lawsuit is in the best interests of Conroe's residents, the Conroe City Council, by resolution passed August 27, 2015, authorized Conroe's being a plaintiff in this lawsuit.

(2) **Quadvest, L.P., d/b/a Quadvest Water and Sewer Utility; Woodland Oaks Utility, L.P.; Crystal Springs Water Co., Inc., d/b/a Crystal Springs Water and Sewer Utility; Everett Square, Inc.; E. S. Water Consolidators, Inc.; Utilities Investment Co., Inc.;**

and T&W Water Service Company. Each of these Plaintiffs is a privately owned water and sewer utility company that provides services to commercial and residential within Montgomery County, Texas.

B. Defendants

(1) **The Directors of the District in their Official Capacities.** Defendants Richard J. Tramm, Sam W. Baker, M Scott Weisinger P.G., Jim Stinson, P.E., John D Bleyl, P.E., Jace Houston, Roy McCoy, Jr., Rick Moffatt, and W. B. Wood are the Directors of the District. They are sued herein for their *ultra vires* acts. They may be served with process at the offices of the District, which is at 655 Conroe Park North Drive, Conroe, Texas 77303, or wherever they may be found.

(2) **The General Manager of the District in her Official Capacity.** Defendant Kathy Turner Jones is the General Manager of the District. She is sued herein for her *ultra vires* acts. She may be served with process at the offices of the District, which is at 655 Conroe Park North Drive, Conroe, Texas 77303, or wherever she may be found.

(3) **The District.** The District is one of many groundwater conservation districts created by the Texas Legislature to operate under, and carry out the purposes of, Chapter 36 of the TEXAS WATER CODE. The District covers the geographical area of Montgomery County, Texas, and that County only. Pursuant to Section 11 of its enabling act, the District has no power to levy taxes. Act of June 16, 2001, 77th Leg., R.S., ch. 1321, §11, 2001 Tex. Gen. Laws 3246, 3249. The District is sued herein to invalidate rules and regulations that are beyond its statutory authority and thus invalid. The District may be served by serving its General Manager at its offices at 655 Conroe Park North Drive, Conroe, Texas 77303.

IV. LEGAL AND FACTUAL BACKGROUND

A. The District's purported *per User* Groundwater Regulations are *Ultra Vires* and thus Invalid.

1. Groundwater conservation districts in Texas, such as the District, have only such powers and authority as “may be conferred by law.” TEX. CONST. Art. XVI, § 59(b). Because the power of the District is limited by the terms of the applicable statutes, the District may exercise no authority that the Legislature has not clearly granted.

2. Section 36.116 of the TEXAS WATER CODE enumerates the types of regulations groundwater conservation districts may adopt by rule in order to regulate groundwater. In pertinent part, Section 36.116 provides as follows:

- (a) In order to minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality, or to prevent waste, a district by rule may regulate:
 - (1) the spacing of water wells by:
 - (A) requiring all water wells to be spaced a certain distance from property lines or adjoining wells;
 - (B) requiring wells with a certain production capacity, pump size, or other characteristic related to the construction or operation of and production from a well to be spaced a certain distance from property lines or adjoining wells; or
 - (C) imposing spacing requirements adopted by the board; and
 - (2) the production of groundwater by:
 - (A) setting production limits on wells;
 - (B) limiting the amount of water produced based on acreage or tract size;
 - (C) limiting the amount of water that may be produced from a defined number of acres assigned to an authorized well site;

- (D) limiting the maximum amount of water that may be produced on the basis of acre-feet per acre or gallons per minute per well site per acre;
- (E) managed depletion; or
- (F) any combination of the methods listed above in Paragraphs (A) through (E).

* * *

- (e) In regulating the production of groundwater under Subsection (a)(2), a district:
 - (1) shall select a method that is appropriate based on the hydrogeological conditions of the aquifer or aquifers in the district; and
 - (2) may limit the amount of water produced based on contiguous surface acreage.

3. Obviously, section 36.116 does not give the District authority to enact or impose any form or type of regulation that it chooses. Instead, the statute authorizes the District to impose only certain types of restrictions. To summarize the statute, the District may impose *spacing* requirements for water wells, and may impose limitations on groundwater production only in certain forms. Under subsection 2(A) of section 36.116, the District may set production limits that apply to *wells*. Under subsection 2(B), the district may limit production of groundwater based on quantities of *acreage or tract size*. Subsection 2(C) provides that a District may limit production of water based on the *number of acres assigned to an authorized well site*, and subsection 2(D) provides that a District may limit production on the basis of *acre-feet per acre or gallons per minute per well site per acre*. Subsection 2(E) states that the District may adopt a rule to manage depletion, and subsection 2(F) permits the District to use the previously-identified regulation methods in combination. Section 31.116(e)(2) provides that the District may limit the amount of water produced based on contiguous surface acreage.

4. Similarly, Section 36.101 of the TEXAS WATER CODE, which defines the District's rulemaking power, states in pertinent part:

(a) A district may make and enforce rules, *including rules limiting groundwater production based on tract size or the spacing of wells*, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.

(emphasis added).

5. Nothing in the TEXAS WATER CODE authorizes the District to impose water production limits on individual water producers, *i.e.*, to adopt a rule providing that no water producer in Montgomery County may produce more than a certain, limited volume of groundwater per year, regardless how many wells that producer owns or how much acreage it owns. But that is exactly what Defendants are threatening to do effective January 1, 2016.

6. The Defendants have purported to adopt, and have continued to amend, a regulation they call the District's Regulatory Plan Phase II(B) (the "Plan"). The Plan, as amended July 14, 2015, states that it "is designed to provide the actual regulatory requirements for achieving a long-term sustainable rate of ground water production within Montgomery County—beginning with an initial conversion effort that is required to be met by 2016." By the Plan, Defendants are threatening to enforce against Plaintiffs (and other large-volume groundwater users in Montgomery County) a per-user production limitation that is neither a well spacing regulation nor a production limit imposed by *well* or based on *acreage, contiguous acreage, or tract size*, and it is not a managed depletion regulation. Instead, the District's Plan, which the Defendant Directors have adopted, says it will regulate groundwater production by imposing production limits on "users," specifically, "large volume groundwater users" ("LVGU"), which are groundwater producers that actually produced, or were authorized by a

District groundwater production permit to produce, 10 million gallons or more of groundwater annually. Plaintiffs are LVGUs as defined by the District's Plan.

7. Under the District's Plan, each LVGU will be required on and after January 1, 2016, to reduce its annual production of groundwater to the greater of (a) no more than 70 percent of the volume of water it produced in 2009, or (b) 10 million gallons. This production limit is *per LVGU*, *i.e.*, it is imposed on each groundwater user, not per well or by acreage, tract size, or contiguous acreage. The District's production limit does not depend in any way on the volume of water any LVGU needs to serve its area, the number of wells the LVGU has, or the groundwater rights the LVGU owns. So, for example, the limit on the City of Conroe, with thousands of water customers, is the same as the limit on an investor-owned utility having one hundred water customers. Furthermore, with some exceptions that are extremely complex and largely defy understanding, each LGVU will be limited to production of the same volumes of groundwater in future years.

8. The TEXAS WATER CODE does not authorize the District to promulgate or enforce the "per user" limitations Defendants threaten to enforce beginning January 1, 2016. Consequently, Defendants have acted outside their lawful authority, and the per user regulations in the Plan are invalid.

9. The effect of the unauthorized "per user" regulations that Defendants are threatening to impose and enforce will be to damage or destroy Plaintiffs' protected property interests in groundwater, as well as the value of groundwater rights throughout Montgomery County. Groundwater in place is a constitutionally-protected real property interest. Although the District has the limited power to regulate groundwater using restrictions authorized by Chapter 36 of the TEXAS WATER CODE, Defendants do not own the groundwater in Montgomery

County, and cannot take, damage or destroy by purporting to regulate, Plaintiffs' or other landowners' real property rights in groundwater.

10. The District's Plan is also unauthorized by law in other ways. For example, the Plan purports to prohibit groundwater lawfully produced within Montgomery County from being sold or transferred from one user to another. Groundwater once produced to the surface becomes personal property. The District's Plan purports to place restrictions on Plaintiffs' purchasing of groundwater produced outside Montgomery County. Defendants have no authority to regulate personal property, *i.e.*, groundwater already produced to the surface.

11. Moreover, and contrary to its enabling legislation and the TEXAS WATER CODE, the District's *ultra vires* Plan is not supported by sound scientific bases. Hence, Defendants' *ultra vires* actions do not serve the public's interest in conservation, preservation, protection, recharging, and prevention of waste of groundwater.

12. The harm the District's Plan poses to Plaintiffs is obvious. By January 2016, Plaintiffs' present groundwater needs already exceed the new limits. For instance, the regulatory plan precludes Conroe, a home-rule city, from carrying out its responsibilities to its residents, current and future, by restricting it from acquiring additional groundwater rights or drilling additional water wells.

13. The individual Defendants have acted and continue to act *ultra vires* when they purport to regulate groundwater production in Montgomery County on a "per user" basis because they are without legal or statutory authority to do so. The District's regulatory plan is beyond Defendants' lawful statutory and Constitutional authority. Plaintiffs challenge the validity of the District's Plan in its entirety and place the validity of that entire Plan before this Honorable Court.

B. The “Desired Future Conditions” Adopted by the District are *Ultra Vires* and Will Take, Damage or Destroy Plaintiffs’ Private Property Rights

14. Pursuant to Section 36.108 of the TEXAS WATER CODE, the District is required to engage in joint management of the aquifers in Groundwater Management Area 14 (“GMA 14”). GMA 14 is a management area designated by the Texas Water Development Board, and includes the District and four other groundwater conservation districts. Under Section 36.108, the groundwater conservation districts of GMA 14 must, on a five-year cycle, adopt Desired Future Conditions (“DFCs”) for each aquifer in the management area. Following adoption of DFCs, each groundwater conservation district must adopt rules designed to achieve those DFCs. The rules the District adopts can and do impact the owners of groundwater within Montgomery County.

15. GMA 14 includes several different aquifers of the Gulf Coast aquifer system. These aquifers are not confined to Montgomery County, and the boundaries of the District are not coterminous with the boundaries of any of such aquifers. Withdrawals of groundwater from the aquifers of the Gulf Coast aquifer system outside the boundaries of the District can and will affect the groundwater inside the boundaries of the District.

16. Section 36.108(d-1) of the TEXAS WATER CODE, provides:

(d-1) The districts may establish different desired future conditions for:

- (1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the management area; or
- (2) each geographic area overlying an aquifer in whole or in part or subdivision of an aquifer within the boundaries of the management area

17. The groundwater conservation districts of GMA 14, including the District, have adopted different DFCs for each of the aquifers of the Gulf Coast aquifer system and each of the counties in GMA 14. There are no identified aquifer subdivisions in any of the aquifers of the

Gulf Coast aquifer system. There are no substantial and discernible differences in uses or conditions of these aquifers within GMA 14 that are delineated by political subdivision lines. However, the DFCs adopted by the districts of GMA 14 are based entirely on political subdivision lines. The District is not authorized by the TEXAS WATER CODE to adopt DFCs based only on political subdivision lines, and consequently, such action is *ultra vires*.

18. By statute, the districts in GMA 14 are required to consider the total estimated recoverable storage in an aquifer before voting on DFCs. The District failed to consider the total estimated recoverable storage of the aquifers in question. The adopted DFCs are artificially and adversely impacted by the failure to consider total estimated recoverable storage. Because the DFCs do not address aquifer storage, the rights of groundwater owners in the District's boundaries are adversely impacted.

19. By statute, the districts in GMA 14 are also required to consider the impact of proposed DFCs on private property, including ownership and the rights of management area landowners and their lessee and assigns in groundwater. The District failed to consider the impact of proposed DFCs on private property, including ownership and the rights of management area landowners and their lessee and assigns in groundwater. The adopted DFCs will damage or destroy private property, including ownership and the rights of management area landowners and their lessee and assigns in groundwater.

20. The DFCs adopted by Defendants are more restrictive than those adopted by other groundwater conservation districts in GMA 14. Defendants have adopted rules regarding production of groundwater that are more restrictive than those of neighboring districts. As a result, groundwater in Montgomery County will be drained by production from outside this County's boundaries. This drainage of privately owned real property will be the result of the

actions of Defendants, a governmental entity and its official officers, without compensation to Plaintiffs. Moreover, the lack of ability to offset drainage and the lower production limits, together and separately, have caused and will cause a diminution in the fair market value of Plaintiffs' groundwater rights in Montgomery County.

21. The DFCs and rules adopted by Defendants are based on a flawed concept of sustainability, *i.e.*, that production from such aquifers should not exceed annual recharge of those aquifers, and that no amount of groundwater should be removed from storage of the aquifers. However, the groundwater in storage is the private property of the landowners, including Plaintiffs. Thus, the District's DFCs and resulting rules deprive Plaintiffs of the use and value of the groundwater in storage beneath their property for public purposes and without compensation.

V. SUIT FOR DECLARATORY JUDGMENT

22. Plaintiffs incorporate the foregoing paragraphs by reference as if set forth fully herein.

23. The individual Defendants, purportedly acting under color of their official capacities as Directors and the General Manager of the District, have approved and intend to enforce the District's Regulatory Plan Phase II(B), for which they have no legitimate legal right to do and, thus, are acting *ultra vires*.

24. Pursuant to Sections 37.001, *et seq.*, of the TEXAS CIVIL PRACTICES & REMEDIES CODE, Plaintiffs pray for declaratory judgments, having the force and effect of a final judgment, as follows:

- a. Declaring that the per user production limits included within the Plan have been adopted without lawful authority, are *ultra vires* of Defendants' powers, and are without lawful effect;

- b. Resolving all other controversies between Plaintiffs and Defendants regarding the Plan and invalid portions thereof;
- c. Declaring that the desired future conditions adopted by Defendants are without lawful authority, are *ultra vires* of their powers, and are without legal effect;
- d. Declaring that Defendants failed to consider the impact of its adopted desired future conditions on private property, including ownership and rights of management area landowners and their lessees and assigns, and that as such the adopted desired future conditions fail to comply with statutory requirements.

25. Plaintiffs reserve the right to plead for further and supplemental relief under TEX. CIV. PRAC. & REM. CODE § 37.011.

26. Plaintiffs also plead for judgment for their costs and reasonable and necessary attorney fees under TEX. CIV. PRAC. & REM. CODE § 37.001, *et. seq.*

VI. THE TEXAS PRIVATE PROPERTY RIGHTS PRESERVATION ACT

27. Plaintiffs incorporate the foregoing paragraphs by reference as if set forth fully herein.

28. Plaintiffs also sue Defendants under the Texas Private Real Property Rights Preservation Act of 1995, TEXAS GOVERNMENT CODE, Chapter 2007. “Private real property” is specifically defined in the Texas Private Real Property Act to include “a groundwater or surface water right of any kind.” TEX. GOV’T CODE § 2007.002(4).

29. Defendants have not complied with the requirements of the Texas Private Property Rights Preservation Act. The District, acting through its Board and General Manager, has not considered, prepared or released to the public a written “Takings Impact Assessment” as

required by the Act. TEX. GOV'T CODE § 2007.044. Plaintiffs request the Court to declare the District's Plan, DFCs, and rules are invalid because Defendants failed to prepare the statutorily-mandated "Takings Impact Assessment" for any or all of those purported acts by Defendants.

30. Furthermore, Defendants are threatening, through the District's Plan, DFCs and rules, to take, damage, and destroy Plaintiffs' private property rights in groundwater by seeking to regulate and severely harm Plaintiffs' underground private property rights in ways that are beyond their legal and statutory authority.

31. As authorized by Section 2007.021 of the TEXAS GOVERNMENT CODE, Plaintiffs request the Court declare Defendants' intentional and foreseeable acts will result in a taking of Plaintiffs' private real property:

- a. Declare that the District's Regulatory Plan Phase II(B) takes, damages or destroys Plaintiffs' groundwater and groundwater rights without Plaintiffs' consent and just compensation and is, therefore, void;
- b. Declare that Plaintiffs are entitled to sever water rights from their land and sell those rights to others;
- c. Declare that the District's Regulatory Plan Phase II(B) will preclude Plaintiffs and other groundwater users in Montgomery county from transferring or selling groundwater produced at the surface, effectively destroying the market for water rights in the County and thereby destroying the value of privately-owned water rights through the District's borders;
- d. Declare that the desired future conditions and the rules adopted by Defendants will prevent landowners and their lessees and assigns from

exercising their right of offset to drainage from surrounding areas, therefore impermissibly resulting in a taking of private property by means of government action without compensation, and are therefore void;

- e. Declare that the desired future conditions and the rules adopted by Defendant result in a diminution of the fair market value of property owned by Plaintiffs, therefore impermissibly resulting in a taking of private property by means of government action without compensation, and are therefore void;
- f. Declare that the desired future conditions and the rules adopted by Defendant deprive Plaintiffs of the use and value of groundwater in storage beneath their property, therefore impermissibly resulting in a taking of private property by means of government action without compensation, and are therefore void.

32. As authorized by Sections 2007.023(b) and 2007.024(a) of the TEXAS GOVERNMENT CODE, Plaintiffs request the Court to declare District's Regulatory Plan Phase II(B), DFCs and rules are invalid under the law, or at a minimum, to invalidate all parts and features of those regulations that will result in a taking of Plaintiffs' groundwater and groundwater rights.

33. Pursuant to Sections 2007.026 and 2007.044(c) of the TEXAS GOVERNMENT CODE, Plaintiffs seek an award against Defendants for their reasonable attorneys' fees and costs in this action.

34. It will be equitable and just for the Court to award Plaintiffs their costs and reasonable and necessary attorneys' fees incurred in this action. Plaintiffs pray for an award of

costs and attorneys' fees against Defendants pursuant to Section 37.009 of the TEXAS CIVIL PRACTICES & REMEDIES CODE.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs asks that each Defendant be cited to appear and answer and, on final trial, that Plaintiffs be awarded a judgment against all Defendants for the following:

- a) Declaratory relief as more particularly address herein;
- b) Injunctive relief as more particularly addressed herein;
- c) Attorneys' fees;
- d) Court costs; and,
- e) Such other relief both general and specific at law or in equity to which Plaintiffs are entitled.

Dated: August 31, 2015

Respectfully submitted,

/s/ Michael V. Powell

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INC.; and T&W WATER SERVICE
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CERTIFICATE OF SERVICE ON ATTORNEY GENERAL

Plaintiffs are serving a copy of this suit on the Attorney General of the State of Texas by certified mail return receipt requested:

The Honorable Ken Paxton
Attorney General of Texas
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/s/ Michael V. Powell