

UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF TEXAS  
 AUSTIN DIVISION

AQUA TEXAS, INC.,

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

Plaintiff,

v.

Cause No. 1:23-cv-01576

HAYS TRINITY GROUNDWATER  
 CONSERVATION DISTRICT and BRUCE  
 MOULTON, LINDA KAYE ROGERS,  
 DAVID SMITH, CARLOS TORRES-  
 VERDIN, AND DOC JONES, each in their  
 official capacities as DIRECTORS OF THE  
 HAYES TRINITY GROUNDWATER  
 CONSERVATION DISTRICT,

Defendants.

**PLAINTIFF’S ORIGINAL COMPLAINT  
 AND APPLICATION FOR PRELIMINARY INJUNCTION**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Plaintiff Aqua Texas, Inc. (“Plaintiff,” “Aqua Texas,” or “Aqua”) and files this Original Complaint against Defendants Hays Trinity Groundwater Conservation District (“Hays Trinity GCD” or “the District”) and Bruce Moulton, Linda Kaye Rogers, David Smith, Carlos Torres-Verdín, and Doc Jones in their official capacities as members of the Board of Directors of the Hays Trinity Groundwater Conservation District (the “Directors”) (collectively, “Defendants”), and alleges as follows:

**I. INTRODUCTION**

1. This case concerns Hays Trinity GCD’s unlawful and unequal treatment of Aqua Texas and its complete disregard for Aqua’s state law duty to provide “continuous and adequate” water service to its customers. Aqua Texas owns and operates wells in the District from which it

produces groundwater to serve the needs of its utility customers for their homes and businesses. The amount of groundwater produced from Aqua's wells is directly dictated by the customers' actual voluntary demand for water service—*e.g.*, turning on the faucet or the dishwasher—not some mandatory usage imposed by Aqua on its customers. The wells Aqua Texas uses to serve its customers were in existence long before the Texas legislature created the Hays Trinity GCD in 2001. Despite Aqua Texas' vested ownership rights in wells and water rights, and its statutory obligation to provide water service to its customers, the Hays Trinity GCD has publicly threatened to not renew Aqua Texas' permit to produce groundwater for its customers because Aqua disputes—and therefore has not paid—an almost half-million-dollar illegal penalty that the District assessed against Aqua Texas. That purported penalty, assessed without even the rudiments of due process, such as notice and a hearing, is set at a production fee amount—\$5.00 per thousand gallons produced—that exceeds the state law cap of \$0.03 per thousand gallons. In other words, the penalty purportedly assessed by the District plainly violates state law *by \$4.97 per thousand gallons—or more than 99 percent in excess of the statutory cap*. To make matters worse, the District then *completely forgave* all penalties assessed against all other similarly-situated utilities, but refused to treat Aqua Texas similarly and instead threatened to not renew Aqua's permit if it did not pay the unlawful penalty.

2. Because both the U.S. Constitution and Texas statutory law prohibit the District's unlawful actions, Aqua brings this suit against the District and its directors in their official capacities and seeks to preserve the status quo—Aqua's use of its wells to serve its customers—during the pendency of this suit.

## II. PARTIES

3. Plaintiff Aqua Texas, Inc. is a corporation formed under the laws of the State of Texas with its principal office in Austin, Texas.

4. Defendant Hays Trinity Groundwater Conservation District is a political subdivision of the State of Texas. It may be served with process herein by serving its President, Bruce Moulton, at the offices of the Hays Trinity Groundwater Conservation District, 14101 Highway 290 West, Building 100, Suite 212, Austin, Texas 78737.

5. Defendant Bruce Moulton is an individual who resides in Hays County, Texas, and serves as President of the Board of Directors of the Hays Trinity GCD. Mr. Moulton may be served with process at the offices of the Hays Trinity Groundwater Conservation District, 14101 Highway 290 West, Building 100, Suite 212, Austin, Texas 78737. Mr. Moulton is sued in his official capacity.

6. Defendant Linda Kaye Rogers is an individual who resides in Hays County, Texas, and serves as Vice President of the Board of Directors of the Hays Trinity GCD. Ms. Rogers may be served with process at the offices of the Hays Trinity Groundwater Conservation District, 14101 Highway 290 West, Building 100, Suite 212, Austin, Texas 78737. Ms. Rogers is sued in her official capacity.

7. Defendant David Smith is an individual who resides in Hays County, Texas, and serves as Secretary/Treasurer of the Board of Directors of the Hays Trinity GCD. Mr. Smith may be served with process at the offices of the Hays Trinity Groundwater Conservation District, 14101 Highway 290 West, Building 100, Suite 212, Austin, Texas 78737. Mr. Smith is sued in his official capacity.

8. Defendant Carlos Torres-Verdín is an individual who resides in Hays County, Texas, and serves as a member of the Board of Directors of the Hays Trinity GCD. Mr. Torres-Verdín may be served with process at the offices of the Hays Trinity Groundwater Conservation District, 14101 Highway 290 West, Building 100, Suite 212, Austin, Texas 78737. Mr. Torres-Verdín is sued in his official capacity.

9. Defendant Doc Jones is an individual who resides in Hays County, Texas, and serves as a member of the Board of Directors of the Hays Trinity GCD. Mr. Jones may be served with process at the offices of the Hays Trinity Groundwater Conservation District, 14101 Highway 290 West, Building 100, Suite 212, Austin, Texas 78737. Mr. Jones is sued in his official capacity.

### **III. JURISDICTION AND VENUE**

10. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because this action is brought to enforce Aqua Texas's civil rights under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments of the United States Constitution. Defendants have no Eleventh Amendment immunity against Aqua Texas's claims in this suit. *See Stratta v. Roe*, 961 F.3d 340, 350-56 (5th Cir. 2020).

11. This Court has supplemental jurisdiction over the causes of action arising under Texas law under 28 U.S.C. § 1367.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the Hays Trinity GCD has its principal office or place of business in Hays County, Texas, which is within the Austin Division of the Western District of Texas. One or more of the other Defendants reside in the Western District of Texas, and are sued in their official capacities as Board members of the Hays Trinity GCD with its principal office or place of business in Hays County, Texas, and a

substantial part of the events or omissions giving rise to Aqua Texas’s claims occurred within the boundaries of the Western District of Texas.

#### IV. FACTUAL BACKGROUND

13. Aqua Texas is a Texas retail public utility regulated by the Texas Public Utility Commission (“PUC”) under Certificates of Convenience and Necessity (“CCN”) No. 13254 for water and CCN No. 21116 for wastewater. Aqua Texas provides water and wastewater retail service to almost 400 systems throughout Texas. As a CCN holder, Aqua Texas has a mandatory state law duty to provide “continuous and adequate service” to its customers. This state law duty requires Aqua Texas to serve its customers’ needs and generally prevents Aqua Texas from shutting down or discontinuing service to its customers except in limited circumstances such as a customer’s non-payment. *See* TEX. WATER CODE § 13.250.

14. Hays Trinity GCD is a political subdivision of the State of Texas governed by Chapter 36 of the Texas Water Code and the enabling legislation for the District. *See* TEX. SPEC. DIST. LOC. LAWS CODE § 8843.101 *et seq.*

15. Aqua Texas provides water and wastewater service to retail customers in three relevant systems within the jurisdictional boundaries of Hays Trinity GCD—Woodcreek Phase I, Woodcreek Phase II, and Mountain Crest. Aqua’s customers in the Hays Trinity GCD are mostly homes in residential subdivisions with ordinary water usage typical of a Texas homeowner.

16. Aqua Texas owns and operates groundwater wells for the utility systems at issue here within the jurisdictional boundaries of Hays Trinity GCD. The Aqua Texas wells were drilled, completed, and operating long before the Texas Legislature created the District in 2001. Thus, Aqua Texas has valuable vested rights and reasonable investment-backed expectations in the ownership of those wells and the associated water rights that are protected by state and federal

constitutional and statutory law. Following the creation and confirmation of the District, the District later issued operating permits to Aqua Texas authorizing production from the Aqua Texas wells.

17. On April 13, 2023, the Hays Trinity GCD sent Aqua Texas a Notice of Alleged Violation (“NOAV”) for exceeding its operating permit production limit for the year 2022. Three of Aqua Texas’s wells—Woodcreek Phase 1 Well 12, Woodcreek Phase II, and Mountain Crest—were alleged to be in violation of exceeding the annual drought-adjusted permitted amounts. Based on such alleged violation, the Hays Trinity GCD assessed \$448,710 in penalties against Aqua Texas. The NOAV ordered Aqua Texas to pay the penalty by May 8, 2023—just over three weeks after the NOAV was sent.

18. Aqua Texas was not the only water provider to receive a NOAV. In fact, twenty NOAVs were delivered in response to alleged over-pumping during drought curtailment.

19. On June 2, 2023, the Hays Trinity GCD Board of Directors considered four settlements from other NOAVs that were sent. The four water service providers asking for forgiveness of assessed penalties include Cedar Oaks Mesa Water Supply Corporation, Ciel Azul Ranch, Danforth Jr. High, and Wimberley Water Supply Corporation (“Wimberley WSC”), with the latter corporation being the most notable.

20. During the Hays Trinity GCD Board of Directors meeting, the Director Defendants discussed a penalty forgiveness policy, determining that the penalty payments would be forgiven in exchange for the water providers’ spending money on conservation efforts. For accountability purposes on the part of the water providers, receipts/documentation of money spent on conservation efforts would be required as proof before the Hays Trinity GCD would renew pumping permits.

21. Wimberley WSC had been assessed \$140,620 in penalties in an April 13, 2023 NOAV. However, at the Hays Trinity GCD Board meeting, the Board President recommended complete forgiveness of the penalty because Wimberley WSC had already spent \$90,000 on conservation efforts and line loss. Director Torres-Verdín expressed concern over the size of Wimberley WSC's penalty and questioned why the Board was simultaneously asking parties other than Wimberley WSC that were assessed with penalties to commit to prospectively spend their full penalty amount in conservation efforts. In response to Mr. Torres-Verdín's stated concern, Board President Rogers charitably described her personal visit to Wimberley WSC's offices. At the conclusion of the meeting, the Board established that if a water service provider can show it *has spent, or will spend*, the amount of the assessed penalty, the Board will forgive the penalty. Board President Rogers indicated that the Board wants any penalty assessment spent fixing line leaks or on conservation efforts instead of going to the District as penalties. The action taken with Wimberley WSC and at the close of the meeting set a precedent and policy for how the Board would handle penalty forgiveness.

22. Aqua Texas, with knowledge of the Board policy and precedent, requested the same penalty forgiveness that was afforded to Wimberley WSC and others whose penalty amounts were completely forgiven. Under the District's established policy, Aqua Texas was entitled to the same penalty forgiveness based on the amounts Aqua Texas had spent—and would continue to spend—on conservation efforts.

23. For years, Aqua Texas has dedicated significant resources to ensure reliable water service to its customers while upholding compliance with the rules of the Texas Commission on Environmental Quality, the Texas PUC, and the Hays Trinity GCD. To date, Aqua Texas has voluntarily spent millions of dollars in water conservation and replacing aging infrastructure to

reduce water loss, to proactively address conservation and for line leakage with the Hays Trinity GCD during the drought curtailment period. The amount that Aqua Texas has spent far exceeds the \$448,710 penalty that the Hays Trinity GCD assessed Aqua Texas.

24. Aqua Texas' commitment to conservation is clearly documented and well exceeds the Hays Trinity GCD's policy and precedent concerning penalty forgiveness. To follow are examples of the documented time, money, and effort spent by Aqua Texas to promote conservation, protect groundwater resources in the District, and, in particular, reduce groundwater production inside the Jacob's Well Groundwater Management Zone ("JWGMZ")—all of which the District has ignored.

25. Jacob's Well is an artesian spring in the Wimberley Valley area of Hays Trinity GCD. Beginning in July of 2022, Aqua Texas initiated a project to voluntarily reduce groundwater production from its wells inside the JWGMZ. The project involved establishing a new well field outside of the JWGMZ to drill two new wells. The new wells would allow Aqua Texas to reduce groundwater reliance on Aqua's wells inside the JWGMZ for the benefit of Jacob's Well and the spring flow from Jacob's Well. After initially notifying the District of the plan in July of 2022, Aqua Texas filed initial applications for the two new wells on August 24, 2022 under the then-existing District Rules. Aqua then commenced drilling those two new wells on September 25, 2022. Aqua Texas ultimately spent \$2 million for the purchase of the land and an additional \$220,968 for drilling and testing the two new wells on the 18-acre property.

26. After Aqua Texas drilled the two new wells to relieve pumping pressure on Jacob's Well, Hays Trinity GCD then changed the rules on Aqua "mid-stream" and imposed an unauthorized permitting moratorium to stop Aqua from obtaining permits for its new wells. The District has refused to issue Aqua Texas permits for the two new wells unless the penalty is paid



in full. Until those permits are issued, Aqua Texas is forced to continue pumping from its existing wells inside the JWGMZ, placing more pressure on Jacob's Well, in order to serve its customers with water as Aqua Texas is statutorily required to do.

27. Aqua Texas also paid for an expensive groundwater study in collaboration with the Hays Trinity GCD and Wimberley Valley Watershed Association to study and evaluate any potential impact of Aqua Texas's new wells outside of the JWGMZ and Jacob's Well and groundwater levels within the JWGMZ. Aqua Texas spent approximately \$85,000 on equipment leasing, aquifer testing, and groundwater consulting services to study the potential impacts. The study confirmed that the new Aqua Texas wells are hydraulically separated from Jacob's Well and that permitting the new wells would plainly benefit Jacob's Well. To date, despite the obvious benefit to Jacob's Well, the District has refused to permit the new Aqua Texas wells or lift the permitting moratorium.

28. Aqua Texas has also spent time, money, and effort to locate and replace aging water distribution lines. The systems for Woodcreek I and Woodcreek II were designed and built decades ago by predecessors of Aqua Texas. Aqua Texas has evaluated the systems' water lines and operational practices to develop a list of targeted line replacements to reduce and minimize leakage. Aqua Texas tracked water loss through a 12-month study and used satellite and acoustic technology to identify line leaks. Aqua Texas undertook this time consuming and costly endeavor to rank the line leaks by size, pipe material, and condition. To further its efforts, Aqua Texas contracted with a company specializing in the identification of line leaks using acoustic sensors. This study cost Aqua Texas \$37,500 and helped identify line leaks in areas served by the wells within the District. Based on the results of this study, Aqua Texas will spend over \$4 million for water line replacement in the Woodcreek area inside Hays Trinity GCD.

29. As an investor-owned utility regulated by the PUC, Aqua Texas lacks governmental enforcement authority to enforce drought restrictions and is obligated to serve its customers' water needs. But within those constraints, Aqua Texas worked diligently to enforce its Drought Contingency Plan and comply with the Hays Trinity GCD's drought curtailment measures. Aqua Texas sent brochures to its customers containing outdoor water conservation measures and initiated a social media campaign to raise drought awareness and provide practical water conservation tips to households. To promote conservation, Aqua Texas promptly notifies its customers of water restriction violations. As a regulated utility, Aqua Texas cannot shut off those customers that violate water restriction violations, but it has diligently tried to achieve voluntary compliance.

30. Aqua Texas has taken further steps to reduce groundwater production inside the District and near Jacob's Well by reducing groundwater production for irrigation. Aqua Texas is upgrading its Woodcreek regional wastewater treatment facility to deliver an effluent of Type I irrigation quality. This design change and heightened treatment will enable the reuse of treated water for irrigation purposes. Aqua Texas's innovation, with an anticipated investment of \$12.5 million, is already underway and on track to be operational by the end of 2024. Because Type I effluent is the highest standard, it can be used broadly for irrigation purposes, thereby substantially reducing the need to produce groundwater for irrigation.

31. Because of the Hays Trinity GCD's established precedent of accounting for documented conservation efforts in the adjustment of any alleged penalties, Aqua Texas provided receipts and documentation of the money spent on conservation and replacing aging infrastructure to the Hays Trinity GCD. Yet, the Hays Trinity GCD refused to follow its *own* precedent and

inexplicably denied Aqua Texas's request for penalty forgiveness—despite Aqua Texas's past, present, and future conservation efforts and commitments.

32. To make matters worse, while Aqua Texas and the Hays Trinity GCD were in settlement discussions regarding these matters, the Hays Trinity GCD unilaterally provided the media (and very likely others) with information regarding the parties' settlement discussions. Under Texas Rule of Evidence 408 and Federal Rule of Evidence 408, there is a general prohibition on communication of settlement discussions. *See* TEX. R. EVID. 408; FED. R. EVID. 408. The Hays Trinity GCD and its representatives violated that prohibition.

33. Moreover, in the Hays Trinity GCD's rendition of the settlement discussions to the media (and likely others), it portrayed a one-sided and grossly inaccurate account of the discussions, while disparaging Aqua Texas in the process. The Hays Trinity GCD forced Aqua Texas into a difficult position due to Aqua Texas's inability to counter this false narrative without violating the Rules of Evidence as well as Texas Disciplinary Rule of Professional Conduct 1.05. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G., app. A (Tex. State Bar R. art. X, § 9).

34. The Hays Trinity GCD has repeatedly shown animosity and bias against Aqua Texas by penalizing not only Aqua Texas, but its customers too. The District and its representatives have stated that if Aqua Texas does not pay the \$448,710 before the end of 2023, the District will not renew Aqua's permits—thereby placing Aqua's customers in danger of having their homes deprived of water service. Without this Court's intervention, if the Hays Trinity GCD is allowed to continue its unequal treatment and unlawful bias against Aqua Texas, the residents who are served by Aqua Texas will be left without water with no viable substitute for water service. This circumstance is plainly untenable.

**V. THE DISTRICT'S UNEQUAL APPLICATION OF ITS PENALTY POLICY VIOLATES EQUAL PROTECTION**

35. The Defendants' establishment of a policy and practice of granting complete penalty forgiveness to similar water utilities for the penalties assessed by NOAVs based on the money spent for conservation efforts, while refusing to likewise forgive Aqua Texas's penalties despite its documented money spent for conservation efforts, deprives Aqua Texas and all others similarly situated of their right to Equal Protection under the Fourteenth Amendment to the U.S. Constitution. Such deprivation of Equal Protection is in violation of 42 U.S.C. § 1983. There is no rational basis for the Defendants' differential treatment of Aqua Texas, but there is cause to believe that the difference in treatment is intentional, and is also the result of the Directors' personal animus towards Aqua Texas. *See e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Lindquist v. City of Pasadena*, 669 F.3d 225, 233 (5th Cir. 2012).

36. Aqua Texas has suffered damages as a result of the Defendants' deprivation of Aqua Texas's right to Equal Protection in the manner stated above.

**VI. THE DISTRICT'S ACTIONS VIOLATE DUE PROCESS**

37. The Hays Trinity Groundwater Conservation District is a creature of statute limited to the powers expressly conferred by the legislature. *S. Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 776 (Tex. App.—Amarillo 2001, no pet.). The scope of any such district's power is measured only by the terms of the statutes which authorize its creation, and it can "exercise no authority that has not been clearly granted by the legislature." *Tri-City Fresh Water Supply Dist. No. 2 of Harris Cnty. v. Mann*, 135 Tex. 280, 285, 142 S.W.2d 945, 948 (1940).

38. Hays Trinity GCD authority to act is set forth—and limited—by the legislature in Chapter 36 of the Texas Water Code and in the District's enabling legislation. Any action taken

by the Hays Trinity GCD is limited to those express grants of authority and, importantly, to any limitations plainly stated in Chapter 36 and the District's enabling legislation.

39. The Hays Trinity GCD has imposed a moratorium on permitting new wells, thereby preventing Aqua Texas from making use of its groundwater under the property that Aqua owns, even after Aqua drilled two new wells at substantial expense. Because Aqua filed initial well construction notifications with the District on August 24, 2022, the District was well aware of Aqua's intent to use those new wells to provide water to its customers. Chapter 36 of the Texas Water Code does not authorize the Hays Trinity GCD to impose a moratorium on permitting new wells, nor does the District's enabling legislation.

40. Aqua Texas has cumulatively spent over \$2.25 million to drill two new wells to produce groundwater for Aqua's customers. Aqua's new wells were intentionally sited outside of the District's designated JWGMZ to reduce Aqua's reliance on wells inside the JWGMZ, yet the District imposed a permitting moratorium after Aqua notified the District of its intent to drill these new wells. Ironically, the District's permitting moratorium on Aqua's new wells harms what the District purports to be concerned about—Jacob's Well—because Aqua must continue to fully utilize its existing wells inside the JWGMZ instead of reducing reliance on those wells in favor of the new wells outside of the JWGMZ.

41. The Defendants' unlawful permitting moratorium violates Chapter 36 and the District's enabling legislation, was imposed without providing Aqua Texas with notice and an opportunity for a hearing and prevents Aqua Texas from the use and enjoyment of its well-established vested property rights in groundwater. This violation of Procedural Due Process constitutes a violation of 42 U.S.C. § 1983.

42. As a result of the Defendants' unlawful permitting moratorium, the Defendants have arbitrarily refused to allow Aqua Texas the right to use and enjoy its vested ownership rights in groundwater, and with no reasonable justification. Such conduct is arbitrary, capricious, and unconscionable. The Defendants' actions violate the Substantive Due Process rights of Aqua Texas.

43. The Defendants' NOAV, refusal to treat the penalty imposed on Aqua the same as for other utilities, and threatened revocation and/or non-renewal of Aqua's groundwater permits were done without sufficient notice and hearing. This violation of Procedural Due Process also constitutes a violation of 42 U.S.C. § 1983.

44. Aqua Texas has suffered damages as a result of the Defendants' deprivation of Aqua Texas's Due Process in the manner stated above.

#### **VII. THE DISTRICT'S REFUSAL TO ALLOW AQUA TO PRODUCE AND USE ITS GROUNDWATER IS A TAKING**

45. Aqua Texas owns 18 acres of real property located in Hays County, Texas. Under Texas law, Aqua Texas owns the groundwater beneath the property and is entitled to drill for and produce the groundwater for beneficial use. An unbroken line of Texas cases extending back well over a century plainly and repeatedly state that a landowner owns the groundwater percolating beneath the surface. First announced by the Texas Supreme Court in *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904), the Texas Supreme Court held that, "[Percolating water] is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is part of, and not different from, the soil." *Id.* at 281. *East* established the rule of property that the landowner is the absolute owner of the corpus of groundwater percolating beneath the surface. *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927) ("[P]ercolating waters . . . are the exclusive property of the owner of the surface of the soil,

and subject to barter and sale as any other species of property.”); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 800 (Tex. 1955) (“[P]ercolating waters are regarded as the property of the owner of the surface . . . .”); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25 (Tex. 1978) (“In reversing the Court of Civil Appeals and rejecting the ‘reasonable use’ rule, this Court [in *East*] adopted the absolute ownership doctrine of underground percolating waters.”).

46. A landowner’s vested ownership rights are protected under both the U.S. and Texas Constitutions from being taken without payment of just compensation. U.S. CONST. amends. V & XIV; TEX. CONST. art. 1, § 17. In *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court confirmed that a landowner owns “the absolute title in severalty” to the groundwater “in place beneath his land” and that the ownership is a vested property right subject to constitutional protection against an uncompensated taking. *Id.* at 831-32, 837-38. Therefore, groundwater owners have a vested right to produce a fair share of the recoverable groundwater that lies in a common reservoir under their property. *Id.* at 830. If government regulation prevents a landowner from use and enjoyment of their water rights, that restriction causes a taking of private property requiring the payment of just compensation. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 139-44 (Tex. App.—San Antonio 2013, pet. denied) (groundwater district’s restriction of landowner’s groundwater production resulted in a taking, requiring payment of just compensation to the landowners).

47. These groundwater ownership rights are further confirmed by the District’s governing statute—Chapter 36 of the Texas Water Code. Section 36.002 clearly sets out that a landowner “owns the groundwater below the surface of the landowner’s land as real property.”

TEX. WATER CODE § 36.002(a). Ownership entitles the landowner to “drill for and produce the groundwater below the surface of real property.” TEX. WATER CODE § 36.002(b).

48. As a groundwater rights owner, Aqua Texas is entitled to produce the groundwater beneath its property, and any denial of such right amounts to confiscation. *Marrs v. R.R. Comm’n*, 177 S.W.2d 941 (Tex. 1944). Because groundwater is a landowner’s property, any order, regulation, or act that takes, damages, or destroys that property right without compensation is *prohibited* by the Fifth Amendment to the United States Constitution and by Section 17 of Article 1 of the Texas Constitution. *See Marrs*, 177 S.W.2d at 949.

49. Aqua Texas has a vested right to ownership and use of the water beneath its property. It applied for permits to drill two wells from the 18-acre tract of land it purchased in furtherance of its conservation efforts. After Aqua Texas purchased the land, and then drilled test wells under the District’s permitting process, the District prohibited Aqua from putting those new wells into production by instituting a permitting moratorium on new wells. The Defendants’ moratorium on permitting new wells prevents Aqua Texas from using its private property for the intended purpose and, therefore, constitutes a taking of Aqua Texas’s private property without compensation.

50. Aqua Texas has suffered damages as a result of the Defendants’ taking and is entitled to just compensation.

#### **VIII. THE DISTRICT’S PENALTY FEE EXCEEDS THE STATUTORY CAP**

51. Aqua Texas was assessed a total penalty of \$448,710 based on the Hays Trinity GCD’s rules on penalty calculations. Effective July 1, 2022, the Board enacted a penalty schedule. Pertinent to this case is the penalty imposed from exceeding the production limit of an operating permit which states that “[e]xceeding production limit of an operating permit” may result in a fee



of “up to \$500.00 plus \$5.00 per 1,000 gallons in excess of the total approved annual amount permitted.” The Hays Trinity GCD assessed this penalty against Aqua Texas. However, the Hays Trinity GCD imposes a penalty on groundwater production that is not authorized by statute.

52. First, the Hays Trinity GCD’s enabling statutes do not permit the assessment of a penalty fee against Aqua Texas. The Hays Trinity GCD was generally granted “the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36, Water Code.” *See* TEX. SPEC. DIST. LOC. LAWS CODE § 8843.101. However, such general grant is subject to specific limitations. In particular, “Notwithstanding Section 8843.101 ... the [Hays Trinity GCD] may not ... assess or collect any fees except as authorized by Section 8843.151 or 8843.152.” *See id.* § 8843.153. That means the Hays Trinity GCD is statutorily prohibited from assessing any fees other than well construction fees, permit renewal application fees, and service connection fees. *See id.* §§ 8843.151-152. By attempting to impose a separate fee as a penalty, the Hays Trinity GCD acted in violation of Texas statute and overstepped its legislative grant of authority.

53. Second, even if the Hays Trinity GCD were authorized to impose penalty fees under Texas Water Code chapter 36, the Hays Trinity GCD’s purported penalty fee exceeds chapter 36’s statutory cap on fees. Fees based on groundwater production—the basis for the District’s purported penalty—are capped at “\$10 per acre-foot payable annually.” *See* TEX. WATER CODE § 36.204(c)(2). Ten dollars per acre-foot equates to \$0.03 per thousand gallons. Yet, the Hays Trinity GCD assessed a groundwater production fee of \$5.00 per thousand gallons. Neither Chapter 36 nor the Hays Trinity GCD enabling act provides any authority for such a fee.

54. Third, even if the Hays Trinity GCD were allowed to impose penalties based on production fees under Texas Water Code chapter 36 in excess of the statutory cap on production

fees, the Hays Trinity GCD's penalty fee would exceed yet another statutory cap. Regardless of the rule violation, civil penalties must be both reasonable and no more than \$10,000.00 per day. *See id.* § 36.102. The District plainly did not use a "per day" penalty assessment, and in light of the Hays Trinity GCD's complete forgiveness of penalties for other similarly situated utilities, the Hays Trinity GCD's civil penalty against Aqua Texas is unreasonable in violation of § 36.102.

55. Aqua Texas has suffered damages as a result of the Defendants' disregard of their governing statutes capping fees and prohibiting unreasonable penalties.

#### **IX. THE DISTRICT'S PERMITTING MORATORIUM EXCEEDS STATUTORY AUTHORITY**

56. Hays Trinity GCD is only authorized to undertake actions in compliance with Chapter 36 of the Texas Water Code and the District cannot exceed that authority by taking actions that are not expressly statutorily authorized. Chapter 36 does *not* authorize the Hays Trinity GCD or any other groundwater conservation district to impose a moratorium on permitting. *See generally* TEX. WATER CODE ch. 36. Despite this plain limitation, the Hays Trinity GCD exceeded its statutory authority under Chapter 36 of the Texas Water Code by imposing an illegal moratorium on permitting new wells.

57. The Legislature has also expressly limited a regulatory authority's ability to change the rules after a development project has been initiated. Chapter 245 of the Texas Local Government Code expressly provides that once an application for the first permit required to complete a property-development "project" is filed with the agency regulating the use of the property, the agency's regulations are effectively frozen in their then-current state for such project. TEX. LOC. GOV'T CODE § 245.002. The regulatory agency is prohibited from enforcing subsequent regulatory changes to further restrict the property's use. Chapter 245 is designed to prohibit regulators from changing the rules governing projects "in the middle of the game," thereby

insulating already-underway development and related investment from the vicissitudes and uncertainties of regulatory decision-making and all that may influence it. *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 250 (Tex. App.—Austin 2011, pet. denied).

58. Aqua Texas spent over \$2.25 million buying new land and drilling two new test wells as part of a project to move groundwater production out of the JWGMZ to the new wells. After Aqua Texas initiated the project and obtained initial permits for the wells from the Hays Trinity GCD, the District adopted its moratorium. The unauthorized moratorium has prevented Aqua Texas from fully permitting and using the wells for production as municipal supply wells for Aqua Texas’s customers. The unauthorized moratorium has had and continues to have a substantial impact on Aqua Texas’s use and enjoyment of its groundwater rights and has further prevented Aqua from serving its customers from these new wells.

59. As the landowner of an 18-acre tract of land outside the JWGMZ, Aqua Texas has the right to drill for and produce groundwater beneath the property. *See* TEX. WATER CODE § 36.002(b). By imposing the illegal permitting moratorium, the Hays Trinity GCD is interfering with Aqua Texas’s groundwater rights.

60. State law mandates that Aqua Texas provide “continuous and adequate service” to its customers and prevents Aqua Texas from shutting down or discontinuing service to its customers. *See* TEX. WATER CODE § 13.250. By refusing to permit the new wells, Hays Trinity GCD is not only abusing its grant of authority under Chapter 36, but also placing Aqua Texas’s customers at significant risk of losing water service.

61. Aqua Texas has suffered damages as a result of the Defendants’ imposition of an illegal moratorium.

## **X. ATTORNEYS' FEES**

62. Pursuant to 42 U.S.C. § 1988, Aqua Texas requests the Court to award reasonable attorneys' fees and costs.

## **XI. APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION**

63. Based on the foregoing paragraphs, Aqua Texas seeks, and is entitled to, preliminary and permanent injunctive relief to enjoin the Defendants' enforcement of their moratorium against the permitting of Aqua Texas's two new wells and to enjoin the Defendants' enforcement of a penalty against Aqua Texas for any year in which the same type of penalty was forgiven with respect to Wimberley WSC or any other similarly situated retail public utility.

64. In addition, based on the foregoing paragraphs, to preserve the status quo, Aqua Texas seeks, and is entitled to, preliminary injunctive relief to enjoin Defendants from terminating, revoking, failing to renew, or otherwise modifying Aqua Texas's permits to prevent Aqua Texas from producing water from its existing wells to serve its customers during the pendency of this lawsuit and during the adjudication of the validity and propriety of the Defendants' penalty sought to be imposed against Aqua Texas.

65. Aqua Texas has a substantial likelihood of success on the merits of its claims against the Defendants. As a result of the conduct of the Defendants, Aqua Texas is being deprived of its right to due process and equal protection and its rights under Texas statutes, and is being deprived of the use and enjoyment, and suffering a possible permanent loss, of its valuable property rights in its groundwater per the Defendants' threats. The equities and public interest are in Aqua Texas's favor due to its customers' (Texas residents) ability to receive water service being dependent on Aqua Texas's wells that the Defendants are threatening to shut down. Further, Defendants threats to revoke, terminate, or not renew Aqua Texas's permits to produce water from

its wells would interfere with Aqua Texas's mandatory state law duty to provide continuous and adequate service to its customers. Such harm would be irreparable.

## **XII. PRAYER**

WHEREFORE, Aqua Texas respectfully requests that the Court:

1. Award preliminary and permanent injunctive relief against the Defendants to enjoin the Defendants' enforcement of their moratorium against the permitting of Aqua Texas's two new wells;
2. Award preliminary and permanent injunctive relief against the Defendants to enjoin the Defendants' enforcement of a penalty against Aqua Texas for any year in which the same type of penalty was forgiven with respect to Wimberley WSC and any other similarly situated retail public utility;
3. Award preliminary and permanent injunctive relief against the Defendants to enjoin the Defendants from revoking Aqua Texas's permits based on the penalties that the Defendants have sought to impose on Aqua Texas;
4. Award compensatory damages to Aqua Texas in an amount to be determined according to proof at trial, together with pre-judgment and post-judgment interest as provided by law;
5. Enter an order against the Defendants awarding attorneys' fees to Aqua Texas pursuant to 42 U.S.C. § 1988; and
6. Grant such other relief, at law or in equity, to which Aqua Texas is entitled.

Respectfully submitted,

By: 

Paul M. Terrill III  
State Bar No. 00785094  
Ryan D. V. Greene  
State Bar No. 24012730  
TERRILL & WALDROP  
810 West 10th Street  
Austin, Texas 78701  
(512) 474-9100  
(512) 474-9888 (Facsimile)  
pterrill@terrillwaldrop.com  
rgreene@terrillwaldrop.com

ATTORNEYS FOR PLAINTIFF  
AQUA TEXAS, INC.