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

FAZZINO INVESTMENTS, LP for itself and all others similarly situated,	§	
***Plaintiffs*,**	§	
v.	§	**CASE NO. 6:25-cv-00001-ADA-DTG**
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,	§	
Defendant.	§	

DEFENDANT BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. 66)

Defendant Brazos Valley Groundwater Conservation District (the "District") submits this Response in Opposition to Plaintiff's Motion for Summary Judgment (Dkt. 66). In support thereof, the District respectfully states the following:

EXECUTIVE SUMMARY

Plaintiff asks the Court grant summary judgment on theories it has not pleaded, the extension of law beyond its recognized application, and unsupported by any evidence.

The Motion should be denied.

Plaintiff's abstract and hypothetical takings claim is about a single piece of property, a 69.41-acre tract of land within the District and the supposed impact on same by the District's district-wide rule amendments in September of 2023. But Plaintiff does not offer in its Motion and does not have any evidence of any relevant impact on that

tract pursuant to the *Penn Central* regulatory taking factors or the *Cedar Point Nursery* physical taking criteria. There is no evidence of:

- Diminished value of the tract as a whole or even the discrete groundwater component of same;
- Harm to Plaintiff's investment-backed expectations (there were none); or
- Physical invasion via "drainage" of subsurface groundwater (there's not just no evidence that more than "ordinary drainage" has occurred, there is no evidence of *any* "drainage" of groundwater in *any* amount from beneath Plaintiff's land).

The lack of evidence is not just dispositive of Plaintiff's entitlement to judgment on the claims pleaded as a matter of governing groundwater law, but it's equally fatal to Plaintiff's attempted invocation of a principle of Texas oil and gas law that has never been applied to groundwater. The *Marrs v. Railroad Commission* approach to "correlative rights" Plaintiff asks this Court to pioneer in applying to groundwater litigation would still require Plaintiff to have suffered an injury to such rights that can only be shown if both the reserves under its land are being drained *and* Plaintiff does not have an opportunity to offset that drainage. Here, Plaintiff concedes that there is no drainage of groundwater from beneath its land and does not even provide evidence of "interference drawdown" (a localized, transient effect of nearby pumping that does not even deplete the resource). The concession that no drainage is taking place would precludes any finding of the requisite injury even if *Marrs* applied.

Plaintiff's hypothetical case actually is an unpleaded equal protection claim, complaining that some landowners who obtained permits under the prior iteration of District rules (a group that Plaintiff was able to join had it chosen to do so) can pump groundwater at a higher annual rate than Plaintiff could under the Amended Rules. But until September 14, 2023, everyone played under the prior Rules; since then, everyone

has played under the Amended Rules. At no time was Plaintiff treated any differently under the live Rules than any other landowner. And under the Amended Rules, Plaintiff can still obtain a permit to produce a functionally unlimited amount of groundwater for a functionally unlimited amount of time.

Plaintiff's "fairness" argument thus fails because (1) it is an unpleaded (and invalid) equal protection claim, (2) it concedes that no traditional taking can be established, (3) ignores the fact that the Texas Supreme Court made plain there are many relevant differences between how oil and gas and groundwater are regulated and thus the property interest itself), and (4) even if the oil and gas analyses advanced by Plaintiff were directly applicable, proof of injury requires a predicate showing of "drainage" of which there is no evidence.

Plaintiff does not like the District's Amended Rules, as is its right, but disagreement with policy does not a takings claim make. But beyond mere disagreement, and presenting an additional defect that closes the door to Plaintiff's claims, Plaintiff *continues* to assert, including in its Motion for Summary Judgment, that the Amended Rules violate Texas law. That complaint precludes a takings claim, which can only be predicated on a governmental entity's lawful act.[1]

[1] *See* Defendant's Rule 12(c) Motion for Judgment on the Pleadings and/or Rule 56 Motion for Summary Judgment (Dkt. 50), fully incorporated herein by reference pursuant to Federal Rule of Civil Procedure 10(c). That Motion fully explains why Plaintiff's takings claim, which contains allegations of illegality that are maintained and have not been abandoned, must be dismissed. Therefore, it also follows that Plaintiff cannot obtain summary judgment on an invalid takings claim.

Nothing has happened to Plaintiff's groundwater. Plaintiff did not and cannot establish a taking under *Penn Central*, *Cedar Point*, or even under its novel and extra-legal *Marrs v. Railroad Commission* "correlative rights" theory.

STATEMENT OF FACTS

A. Plaintiff's Property

Plaintiff's property that is the subject of the Complaint is a single 69.41-acre tract of land in Robertson County ("Fazzino Property"). (Ex. B at 18:3–10.) It was acquired by Plaintiff as a gift transfer in 2021 (Ex. B at 18:11–20:6) and has been used for hay production both before and after Plaintiff's acquisition. (Ex. B at13:10–25), earning around $10–15 per acre for the hay production lease rights (Ex. B at 14:19–15:7).

There is no Simsboro aquifer well on the Fazzino Property, and Plaintiff has never sought a permit for such a well, either before or after the District's 2023 rule amendments. (Ex. B at 105:18–25.)

B. The District's Rules

The Brazos Valley Groundwater Conservation District was created to conserve, preserve, protect, and recharge groundwater in Brazos and Robertson Counties, with broad authority under Chapter 36 of the Texas Water Code to manage groundwater resources within its jurisdiction. Pursuant to that authority, the District promulgates rules, including rules that govern well spacing and production limits.

Under the District's current rules, Plaintiff could obtain a permit to produce 587.1 acre-feet of Simsboro groundwater per year, which amounts to 8.46 acre-feet per surface acre owned (that is, the 69.41-acre surface area). (Ex. A, Ex. A-1.) Once such a permit

is obtained, the District's rules allow for that permit and the groundwater production thereunder to be maintained indefinitely. (Ex. A-3[2]; Ex. B at 38:18–25.)

C. Property Valuation

Neither Plaintiff nor Plaintiff's expert Mike Thornhill offer any evidence or opinion of the value of the tract as a whole.[3] There is no record of the value of the Simsboro groundwater component of the estate—before or after the District's 2023 rule amendments. (Ex. B at 32:13–33:12, 36:20–38:9.) No appraisals of the property have been conducted, either before or after the amendments to the District's Rules. (Ex. B at 36:20–37:9.) Plaintiff has no information about the value of any groundwater on any of its property. (Ex. B at 55:25–56:3.) Further, Plaintiff has no knowledge of the value of any part or whole of estate/tract. (Ex. B at 96:16–97:10; Ex. C at 14:10–14.)

D. Development of Groundwater Well on Plaintiff's Property

Plaintiff has never made an effort to market or sell groundwater before or since the rule amendments. (Ex. B at 62:22–63:20; 71:12–23.) Plaintiff had no contract or commitment in place to sell water before rule change. (Ex. B at 86:8–16.) Plaintiff has not expended any material time or money in pursuing the development of Simsboro aquifer groundwater beneath its property. (Ex. B at 91:16–92:4, 98:7–13.) Plaintiff did

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[2] The copy of the Rules attached to Mr. Day's declaration is the most current iteration of the Rules. The relevant text of the Rules challenged in this action, specifically Rules 6.1 and 7.1, is unchanged from the version of the Rules promulgated September 2023 and as included in Plaintiff's summary-judgment evidence.

[3] The only evidence of value of the tract in this case, and which is not part of Plaintiff's summary judgment evidence, are county property tax records, which show that the appraised value of the tract has *increased* since the District's 2023 rule amendments. (Ex. B at 33:16–36:3.)

discuss various possibilities for the tract's groundwater under the current Rules with the District's General Manager, Alan Day, including potential commercial use with Wellborn SUD and residential use. (Ex. B at 24:6–27:17, 29:14–30:15, 92:5–18.) Under the existing rules, there are potential uses of the tract's groundwater and the surface estate has additional uses, as well. (Ex. B at 92:15–93:5.)

Thornhill acknowledges (1) that there can be multiple other uses for Simsboro water in the District, and (2) he hasn't analyzed any tract (including the Fazzino tract) to determine what purposes might be applicable, or the economic cost or yield of such purposes. (Ex. C at 18:17–20:13, 21:14–22:3.)

E. No Drainage of Groundwater from Plaintiff's Tract

Plaintiff's Motion submitted no evidence of any actual drainage of groundwater from beneath the Fazzino tract, or any evidence that the volume of groundwater in place has been reduced by any measurable amount. Pointedly, Plaintiff's expert does not offer any opinion that any groundwater actually has been "drained" from beneath the Fazzino tract (or any other tract).

> Q And again, "drainage," your -- that's your change in direction and magnitude of flow through the aquifer?
> A Yes.
> Q Okay. You're not offering any opinion that that effect has actually occurred or is about to occur on the Fazzino tract?
> A I don't have any basis to -- to know if it is or isn't on the Fazzino tract. No.

> Q Okay. And again, you're not offering any particular opinion as to any landowner suffering drainage as you define it; right?
> A That's correct.
> Q You're not offering any opinion as to any landowner suffering reduction in storage of any amount; right?
> A That's correct.

(Ex. C at 59:19-60:2, 77:10–17.)

He does not even offer any opinion that the "artesian head" of any potential well on the Fazzino tract has declined as a result of the operation of any other wells. (Ex. C at 37:23–38:7.) He does not offer any opinion that the amount of Simsboro groundwater beneath the Fazzino tract has been reduced by any measurable amount. (Ex. C at 38:8–12.) Instead, he concedes that the operation of large-volume wells within the District will still leave the aquifer "completely full, and there will be only an infinitesimal reduction in storage." (Ex. C at 42:20–43:8.)

SUMMARY JUDGMENT EVIDENCE

In support of the District's Response in opposition to Plaintiff's Motion for Summary Judgment, the District relies upon a incorporates by reference the following:

Exhibit A Declaration of A. Day

- Attachment A-1 Well Footprint Diagram
- Attachment A-2 Groundwater Production Chart
- Attachment A-3 District's Rules

Exhibit B Plaintiff's Corporate Representative Deposition Excerpts

Exhibit C M. Thornhill Deposition Excerpts

ARGUMENTS AND AUTHORITIES

A. Plaintiff's takings claim is precluded because Plaintiff asserts the amendment to the Rules is unlawful.

At the outset, Plaintiff's Motion should be denied because of a fatal defect present from inception in its Complaint—Plaintiff pleads a taking but asserts illegality.

As presented further to this Court in the District's Rule 12(c) Motion for Judgment on the Pleadings and/or Rule 56 Motion for Summary Judgment (Dkt. 50, incorporated by reference herein), Plaintiff maintains its complaint that the District "unlawfully amended" its Rules, and that such amendment was "wrongful." (Dkt. 1, ¶ 38, ¶ 25(i)). This complaint that the District's Rule Amendments are somehow illegal is found in most every pleading Plaintiff has filed with this Court, up to and including its Motion for Summary Judgment. (Dkt. 66 at 2, contending that the rule changes are "not based on hydrogeology or any other science as required by TEX. WATER CODE §36.116(e)(1)"; Dkt. 66 at 16, arguing the rules are "based not on aquifer conditions, hydrogeology, or science—as required by the Texas Water Code.")

An invalid governmental act *cannot* be the basis for a takings claim because the taking inquiry presupposes validity: it asks whether a *lawful* exercise of governmental power requires compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *Mahoney v. United States*, 129 Fed. Cl. 589, 592–93 (2016) ("In order to recover on a takings claim, the 'allegation must not be that the [g]overnment's conduct in and of itself violated the law, but that the effect of a valid exercise of sovereign authority resulted in the taking of private property for public use, but without payment.'"); *Rith Energy v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) ("an uncompensated taking and an

unlawful government action constitute 'two separate wrongs [that] give rise to two separate causes of action.'"). Seeking repeal, as Plaintiff does on page 20 of its Motion, is the remedy for illegality, whatever constitutional label it attaches to the claim.

So long as Plaintiff maintains that the District's actions violated the law in any way, Plaintiff cannot maintain a takings claim. The structural incompatibility is a matter of substance, not form.

Not only are the claims that the District has effected a taking and that the Rules are facially illegal mutually exclusive, but both fail as a matter of law in this case. The Court need not—and should not—wade into the merits of either the *Penn Central* or *Cedar Point* analysis to resolve this case. The threshold defect is dispositive. Plaintiff has had ample opportunity to elect its theory but has continually failed to do so.

B. Plaintiff's takings theories fail as a matter of law.[4]

Plaintiff has pleaded both a regulatory taking and a per se/physical invasion taking. (Dkt. 31 at 9.) Even if the Court considers the merits and sets asides the intellectual and legal incongruity created by the pleading of illegality, both of Plaintiff's taking theories fail on their own terms, doomed not only by a lack of evidence of the necessary factors, but by Plaintiff's own evidence actually negating those factors.

[4] Defendant further incorporates by reference its arguments regarding the merits of Plaintiff's takings claim in its Response in Opposition to Plaintiff's Motion for Class Certification (Dkt. 39).

1. Applicable Takings Law

a. Regulatory Takings

The Fifth Amendment prohibits the government from taking private property without just compensation. Not every regulation that affects or limits property use constitutes a compensable taking. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Where no permanent physical occupation is alleged, courts apply the multi-factor balancing test established in *Penn Central*. Under that framework, courts weigh three factors: (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.*

The first factor requires more than a showing of diminished value—the claimant must demonstrate a substantial diminution in the value of the parcel *as a whole*, not merely of the affected use or segment of the property. *Id.* at 130–31. Courts refuse to "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130.

The second factor turns on whether the claimant held reasonable, investment-backed expectations that the regulatory regime would not apply. Expectations that were never reasonable—because the resource has long been subject to pervasive state regulatory authority—do not weigh in favor of a taking. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–06 (1984).

The third factor examines whether the governmental action more closely resembles a physical invasion versus an "adjustment of the benefits and burdens of

economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124. A general regulatory limitation on the use of a shared and regulated resource falls squarely toward the latter end of that spectrum.

b. Per Se/Physical Invasion

A categorically different—and categorically narrow—theory applies when the government physically appropriates property or authorizes a third party's permanent physical occupation of it. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). In *Cedar Point*, the Supreme Court held that a regulation requiring agricultural employers to allow union organizers onto their land effected a *per se* taking because it appropriated an easement—a government-authorized right of physical invasion—in favor of a third party. *Id.* at 148.

The Court carefully confined its holding. A physical invasion taking requires an actual government-authorized physical appropriation of property or a compelled grant of access to a third party. *Id.* at 152–53. The *per se* rule does not reach regulations that merely restrict a property owner's use of their own property—those remain governed by *Penn Central*. *Id.* at 153. The Court reaffirmed that regulatory adjustments to the use of a natural resource held subject to state authority are analyzed under *Penn Central*, not as categorical physical takings. *Id.*

2. Penn Central, not a categorical rule, governs this claim.

While Plaintiff has pivoted to arguing physical invasion, the claim pleaded and before this Court is a regulatory taking. *Penn Central* is governing authority for such a claim, yet Plaintiff's Motion does not apply the *Penn Central* factors. Instead, Plaintiff

invokes a quasi-categorical confiscation theory drawn from Texas oil and gas cases (but never applied to Texas groundwater law) and argues that any rule producing a "disparate" result between producers in the same aquifer is a *per se* taking.

3. Plaintiff has not and cannot establish the Penn Central factors.

Plaintiff argues its challenge is "facial" because the rules "cause an unconstitutional result without exception." (Dkt. 66 at 19.) That theory cannot be squared with *Penn Central*, which was specifically designed to reject categorical rules in favor of property-specific, context-sensitive analysis. 438 U.S. at 124. A facial regulatory taking claim is cognizable only in the narrow circumstance where the regulation categorically eliminates all economically productive use of land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Plaintiff does not allege a total wipe-out of all land use; it alleges a reduction in groundwater production capacity. That is a *Penn Central* partial-regulatory-taking claim, which is inherently property-specific and cannot be adjudicated on a facial, across-the-board basis.

Importantly, as to those property-specific factors, Plaintiff has not presented any of the requisite proof. Plaintiff presents no evidence of any economic impact in the form of quantified lost value of its tract as a whole. Plaintiff has neither any investment in its property (either as a whole or as just a groundwater asset) nor any investment-backed expectations in its property. The complete lack of evidence not only precludes summary judgment in Plaintiff's favor, it precludes Plaintiff's claim from proceeding at all.

a. Economic impact on the parcel as a whole.

Penn Central requires assessment of economic impact on Plaintiff's 69.41-acre parcel as a whole, not merely on the groundwater rights Plaintiff aspirationally wishes to develop. 438 U.S. at 130–31. Courts refuse to "divide a single parcel into discrete segments." *Id.* Rather, the test for a regulatory taking requires the court "to compare the value that has been taken from the property with the value that remains in the property . . ." *Murr v. Wisconsin*, 582 U.S. 383, 395 (2017). Plaintiff's Motion addresses neither the value of the entire parcel or even the value of the groundwater portion of the estate in isolation; it addresses only the general economics of commercial groundwater production. No evidence has been submitted, and none exists, of the overall diminution in value of the 69.41-acre tract considered as a whole—for any use, agricultural, commercial, or otherwise. That failure is fatal to the first *Penn Central* factor.

Plaintiff's complaint that drilling is economically infeasible is conclusory and unsupported by evidence of actual cost-benefit analysis, market value of water rights under the New Rules, or alternative uses. The economic impact of a regulation is a primary factor that requires careful examination and weighing of all relevant circumstances. Plaintiff has presented no evidence regarding the actual market value of its property before and after the Amended Rules, the cost of drilling and operating a well under the New Rules, the market price for water that could be produced under the New Rules, or whether alternative uses of the property remain economically viable.

Neither Plaintiff nor Plaintiff's expert offer *any* evidence or opinion of the value of the tract as a whole—or even just the value of the Simsboro groundwater component

of the estate—before or after the District's 2023 rule amendments. (Ex. B at 32:13–33:12, 36:20–38:9 (no appraisals), 38:6–9 (groundwater value), 55:25-56:3, (no knowledge of value of any part or whole of estate), 96:16–97:10; Ex. C at 14:10–14.) In fact, Plaintiff's expert expressly disclaimed offering any opinion of monetary value.

> Q Okay. So you're not offering any opinion of the dollar value of the Fazzino tract in this case?
> A No.
> Q Either before the rule change or after?
> A No.
> Q You're not offering an opinion as to the dollar value of the groundwater component of the Fazzino tract alone?
> A Nope.

(Ex. C at 15:8–16.)

In addition to not offering any opinion, Thornhill has no knowledge of valuation of any tract of groundwater in the District. (Ex. C at 63:14–24.) And Plaintiff fails to offer any appraisal or other evidence to establish valuation and satisfy this requisite element of its takings claim. In fact, the county tax records, which were not attached to Plaintiff's summary-judgment motion, show that the value of the tract has *increased* since the Amended Rules were promulgated in 2023. (Ex. B at 33:16–36:3.)

The absence of such evidence is dispositive of the economic impact factor.

b. Investment-backed expectations

Plaintiff acquired the 69.41-acre tract in 2021 as a gift without a groundwater production permit and without a well. (Ex. B at 18:3–20:6.) It has never invested in groundwater production infrastructure on the property. (Ex. B at 91:16–92:4, 98:7–13.) Its stated goal is to *sell* its groundwater rights to a commercial production company.

(Dkt. 66 at 3.) And while Plaintiff testified about the abstract potential for selling water to a system like Wellborn Utility District, it testified that it never had any conversation with Wellborn for such plans. (Ex. B at 24:14–16.) There are no contracts in place to sell water. (Ex. B at 103:21–105:15.) Indeed, Plaintiff has made *no* investment and incurred *no* expenses in any effort to sell or market its groundwater either before or after the rule amendments. (Ex. B at 62:22–63:20, 71:12–23.) A mere prospective commercial aspiration held by a landowner who has never produced from the property is not a "distinct investment-backed expectation" entitled to *Penn Central* protection. Moreover, the District has held and exercised authority to set and revise production limits since its formation in 2001. No landowner operating in this regulatory environment could hold a reasonable expectation of unlimited production unconstrained by future rule changes.

The reasonable investment-backed expectation analysis is designed to account for property owners' expectation that the regulatory regime in existence at the time of the acquisition will remain in place. *See Rith Energy v. United States*, 270 F.3d 1347, 1350–51 (Fed. Cir. 2001). The purpose of considering "investment-backed expectations is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Columbia Venture, LLC v. Richland Cnty.*, 413 S.C. 423, 449 (2015) (quoting *Cienega Gardens v. United States*, 331 F.3d 1319, 1345–46 (Fed. Cir. 2003)). The critical question is what a reasonable owner in the claimant's position should have anticipated. *Id.* (quoting *Chancellor Manor v. United States*, 331 F.3d 891, 906 (Fed. Cir. 2003)).

Here, where Plaintiff made no investment in property it acquired by gift, and even then, acquired the property knowing that groundwater regulation was subject to change and/or that in a highly regulated industry, any investment-backed expectations it had would be correspondingly limited. A property owner cannot reasonably rely on an assumption that regulations will forever remain the same, and that the government will refrain indefinitely from valid changes in zoning to enhance the public interest. *See Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 161, (1980) ("a mere unilateral expectation or an abstract need is not a property interest entitled to protection.") Groundwater regulation in Texas is expressly authorized and contemplated. Groundwater provides 60% of the water used in Texas each year, and in many areas of the state, demand exceeds supply. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012). Given this regulatory context, a reasonable property owner should have anticipated potential periodic changes to groundwater production rules. The absence of any evidence regarding Plaintiff's actual investment-backed expectations (and evidence proving that there were no such expectations) creates a genuine dispute of material fact that precludes summary judgment.

c. Character of the governmental action

The challenged rules adjust the acreage-to-production ratio for new permit applications in furtherance of aquifer conservation. That is a textbook "adjustment of the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. The Amended Rules authorize no physical entry onto Plaintiff's land, appropriate no easement, and dispossess Plaintiff of no discrete asset. Rather, generous

production of groundwater is still allowed; Plaintiff could obtain a permit for 587.1 acre-feet of Simsboro groundwater per year, equating to 8.46 acre-feet of water per surface acre. (Ex. A, Ex. A-1). That annual permitted amount is among the most generous in the State of Texas. (Ex. A-2). This factor weighs heavily against a taking.

4. The Cedar Point physical invasion theory fails.

Plaintiff's physical invasion theory fails at the threshold. *Cedar Point* requires identification of a specific government-authorized physical occupation of or intrusion upon the claimant's property. *Cedar Point*, 594 U.S. at 152–53. A rule adjusting the permissible volume of groundwater production by permittees within the District does not authorize any person to physically enter Plaintiff's 69.41-acre tract, does not appropriate any easement across it, and does not compel Plaintiff to grant access to any third party. As this Court has noted, even if Plaintiff's approach had legal merit, "[t]o determine whether the [Plaintiff has] experienced a per se taking, the Court would need evidence of drainage." (Dkt. 63 at 8).[5]

Plaintiff presents no such evidence; Plaintiff has not had *anything* confiscated or taken from it. Plaintiff did not present evidence of any "drainage" (as Plaintiff defines the term) beneath its property, and Plaintiff concedes that it has no evidence of any such drainage. (Ex. B at 84:20–85:4, 85:12–15.) Plaintiff deferred to its expert for any opinion

[5] Plaintiff couches its claim as something of a "right to exclude" claim, arguing that it must be allowed to prevent others from draining the Simsboro groundwater from beneath its land, but does so without acknowledging what its actual property right is: "a landowner has a right to exclude others from groundwater beneath his property, *but one that cannot be used to prevent ordinary drainage*." *Day* at 830 (emphasis added). Thus, Plaintiff would need not just evidence of drainage, but of drainage greater than "ordinary drainage."

on drainage. (Ex. B at 88:7–11, 88:21–89:1.) But Plaintiff's concession was corroborated by its expert, who expressed no opinion of any drainage occurring on Fazzino, or any other, tract. (Ex. C at 59:19–60:6, 77:10–13). Plaintiff did not present evidence of any depletion or reduction in storage of Simsboro aquifer groundwater beneath its property in any amount, and Plaintiff concedes no such reduction has taken place or ever will take place. (Ex. C at 38:8–12, 42:20–43:8, 77:14–17.)

To find a per se taking "the Court would need evidence of drainage." Plaintiff did not present any such evidence because no drainage or depletion of the Simsboro groundwater beneath Plaintiff's tract is happening. There thus is no physical invasion and no *Cedar Point* claim. The effect of the regulatory adjustment of the District's Rule Amendments, if it is to be considered at all, must be examined under *Penn Central* alone—under which, as shown above, Plaintiff cannot prevail.

Plaintiff cannot meet its burden of proving all elements of its takings claim in the absence of evidence on requisite elements. The absence of evidence is dispositive and requires denial of summary judgment.

C. Plaintiff's grievance is comparative, not confiscatory.

As shown above, nothing has been confiscated from Plaintiff; its groundwater is not being drained or depleted. Strip away the constitutional takings label, and Plaintiff's grievance is really this: it's not that Plaintiff has *lost* any groundwater, it's that other landowners are permitted to produce *more* groundwater than Plaintiff is, and that disparity is unfair. The rule change, as characterized by Plaintiff, drew a line between existing wells and new wells, and Plaintiff ended up on the wrong side of it. Plaintiff

does not contend it has been deprived of all economically viable use of its land. It contends it has been treated less favorably than some unidentified neighbors.

That is not a takings argument, per se or otherwise. That is an equal protection argument, where no equal protection claim has been pleaded. And the claim was not pleaded for good reason.

It is an argument and claim this Court already considered and rejected in *Fazzino v. Roe* where the plaintiff alleged that the District's rules, by grandfathering the City of Bryan's Well 18 as an "existing well" while denying him equivalent production rights, violated his right to equal protection. *Fazzino v. Roe,* No. 6:18-CV-00114-JCM, 2021 U.S. Dist. LEXIS 257317 (Aug. 23, 2021). The theory here is structurally identical: (1) the rule creates a classification; (2) Plaintiff perceives a disadvantage relative to others drawing from the same aquifer based on the timing of the granting of their permit; (3) the disparity is allegedly unjust.

This matters for two independent reasons. First, both takings theories Plaintiff has either pleaded or tried to advance in this case, a *Penn Central* regulatory taking and *Cedar Point* physical invasion, do not accommodate Plaintiff's grievance. Neither framework asks whether the government treated one property owner more favorably than another. Rather, they ask whether the regulation deprived this owner of this property right to a degree that compensation is required. Plaintiff's comparative, disparity-based theory fits neither mold.

Second, to the extent Plaintiff is actually advancing a disguised equal-protection claim, that claim has already failed in this Court as referenced above, finding that the

District's rules and a distinction based on timing are supported by a rational basis. Plaintiff could not prevail on this disguised equal-protection claim as a matter of law, and no relief should be granted as to such a defective claim in disguise.

Penn Central is property-specific and owner-specific. It asks how severe the impact is on *this* parcel, what *this* owner's reasonable expectations were, and what the character of the governmental action is as to *this* property. 438 U.S. at 124. It contains no comparative element. What neighbors produce, what pre-2023 permit holders are allowed, and other comparator questions—none of that appears in the *Penn Central* analysis. The factors ask whether Plaintiff was deprived of the value or use of its own property; they do not ask whether Plaintiff received less than someone else.

Plaintiff's motion is built around the comparison. "400% more land" and "two buckets"—that framing is the language of equal protection, not takings. Because Plaintiff's actual theory does not fit the takings framework it has pleaded, it cannot establish entitlement to judgment as a matter of law under either.

The common undercurrent to Plaintiff's theories is the premise that each landowner holds a vested entitlement to a proportionate, acreage-based share of aquifer production, and that any rule diminishing that proportionate share *relative* to neighbors is a taking. But the Texas Supreme Court in *Day* rejected surface area as the proper measure of groundwater fair share. 369 S.W.3d at 840–41. If the claimed property right—a proportionate acreage-based production share—has never been recognized under Texas law, there is no baseline from which to measure deprivation, no reasonable investment-backed expectation to protect, and no taking claim that survives *Penn*

Central scrutiny. The comparative grievance fails at the property-right level before either taking framework is reached.

D. Plaintiff's novel alternative "takings" theory based on principles of Texas oil & gas law never adopted or applied to groundwater fails on both the law and facts.

Likely knowing that it cannot prevail on a *Penn Central* or *Cedar Point Nursery*-type claim, Plaintiff very much wants this Court to do something that no Texas court has ever done: adopt and apply to *groundwater* the oil and gas rule from *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944). Aside from failing to acknowledge that no Texas court has ever applied the *Marrs* approach to groundwater, Plaintiff also ignores (1) the fact that the *Marrs* approach has not been adopted for very good reason—"[g]roundwater is different" than oil and gas in many relevant respects, and (2) the fact that even if the *Marrs* approach was adopted, Plaintiff could not establish a taking because a necessary element of that approach is that "drainage" is occurring, of which Plaintiff offered no evidence, and indeed Plaintiff's witnesses have made clear is *not* the case here.

1. The Marrs approach has never been applied to groundwater, nor should it be, because "groundwater is different" than oil and gas in many relevant respects.

The Texas Supreme Court had the opportunity to consider and apply the *Marrs* oil and gas approach to groundwater in *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, but declined to do so.

The Court actually explained its reasoning, first acknowledging the oil and gas principle embedded in *Marrs* and advanced by Plaintiff here, that "[t]he principal

concerns in regulating oil and gas production are to prevent waste and to provide a landowner a fair opportunity to extract and market the oil and gas beneath the surface of the property." *Id.* at 831. The *Day* court then distinguished in the very next sentence that "[g]roundwater is different in both its source and uses." *Id.* The court noted the myriad ways that oil and gas are different, observing that while oil and gas is non-renewable, groundwater is often replenished, and groundwater regulation must take into account many factors, including future needs, environmental impacts, and subsidence. *Id.* Perhaps most importantly here, the *Day* court expressly held that "a landowner has a right to exclude others from groundwater beneath his property, *but one that cannot be used to prevent ordinary drainage*." *Id.* at 830 (emphasis added). In issuing its limited holding that groundwater in place is owned by the landowner, the Court summarized that the full set of rights between oil and gas owners and groundwater owners "are different," and "there certainly are . . . important differences between groundwater and hydrocarbons." *Id.*

The approach from *Marrs* is based on one of those key differences: the oil and gas landowner must have a "fair chance" to recover hydrocarbons because the reservoir of that non-renewable resource is being drained and depleted by adjoining drilling. *Marrs*, 177 S.W.2d at 948 (in that case, oil was "taken from the depleted Church-Fields area [and] replaced by oil drained from petitioners' property.") That is, the predicate of drainage of non-renewable hydrocarbons is embedded and necessary. That predicate is different than groundwater, which is subject to and not protected from "ordinary

drainage," and which "is often being replenished from the surface." *Day*, 369 S.W.3d at 830, 831.

Not only does the law speak to the difference in character between oil and gas and groundwater, so does Plaintiff's expert regarding this very aquifer:

Q That's correct. So it is correct if we were standing in front of the court today, and the judge turned to you and asked, "Look, I want to know what these large-volume wells do to the total volume of water remaining in storage under any particular property." You would say, "The aquifer will remain completely full, and there will be only an infinitesimal reduction in storage." Wouldn't you?

A Yes.

Q Bottom line is, however many millions of gallons of Simsboro groundwater exists in a local area, that number of millions are going to remain functionally the same.

A Functionally the same in -- yes.

(Ex. C at 42:20–43:8.)

The *Day* court was well aware of *Marrs* and the principles contained therein. It acknowledged the key principle, followed immediately by discussion of how hydrocarbons and groundwater are different. And most importantly, neither *Day* nor any other Texas case has ever adopted or applied the *Marrs* approach regarding drainage in the groundwater context. This Court should not do what Texas courts—having had ample opportunity to do so—have thus far declined to do.

2. Even if the Marrs approach applied, Plaintiff could not establish an injury because it cannot establish the necessary elements of "drainage" or "confiscation."

A fundamental premise/element of the *Marrs* analysis and "rule" was that there must be depletion of a common reservoir. With no depletion, there cannot be any

deprivation of a "fair chance to produce a fair share." Plaintiff acknowledges that necessary predicate in its own motion, tying its "fair share" argument to the point that denial of "the *right* to protect their property from drainage is a 'confiscation' (taking)" and stating that that the purpose of the principle is "to prevent confiscation of [the landowner's] property" (quoting *Railroad Commission v. Shell Oil*, 380 S.W.2d 556 (Tex 1964)). "Drainage" and "confiscation" thus are central and essential principles.

So, how does one establish the "injury" that Plaintiff complains of in the context of hydrocarbons under Texas law? The requirement is plain: a plaintiff "establishes injury to correlative rights" *only if* he "demonstrates that reserves underlying his land are being drained, and that he does not have an opportunity to offset that drainage." *Texaco Prod. Inc. v. Fortson Oil Co.*798 S.W.2d 622, 624 (Tex. App—Austin, 1990, no writ). If the rule applies, and if Plaintiff wants to establish injury necessary to establish a taking under that rule, Fazzino must show both that (1) drainage of groundwater from beneath its land is happening, and (2) that Fazzino does not have an opportunity to offset it. *Fazzino did not and cannot prove either element as to its tract.*

There is no evidence of *any* drainage as to the Fazzino tract. (Ex. C at 59:19–60:2) or as to any other landowner in the District (Ex. C at 77:10–13). There is no evidence of *any* reduction in the amount of Simsboro groundwater beneath the Fazzino tract (Ex. C at 38:8–12) or as to any other landowner in the District (Ex. C at 77:14–17, 42:20–43:8). The Rules place only an annual cap on production, and permitted wells can keep pumping the annually permitted amount indefinitely. (Ex. B at 38:18–25.) There is not even any evidence of any property, including the Fazzino property, actually suffering

any decline in artesian head or pressure as a result of the Rule Amendments. (Ex. C at 37:23–38:7.) There thus certainly is not any evidence of Fazzino suffering more than "ordinary drainage" as contemplated and allowed under *Day*. *Day*, 369 S.W.3d at 830.

No drainage or depletion of groundwater from beneath Plaintiff's land is actually happening. Plaintiff therefore fails to establish the necessary first element of the requisite injury to state a *Marrs*-type claim. It also logically follows that if no groundwater is being drained, and the volume of groundwater beneath Plaintiff's land is the same today under the Amended Rules as it was under the prior Rules, then there is no confiscation or drainage that Plaintiff needs the opportunity to offset. Plaintiff's Complaint, and thus its Motion, is an abstract hypothetical. No relief can be granted as to a hypothetical, especially when undisputed evidence definitively negates that hypothetical.

CONCLUSION AND PRAYER

Defendant respectfully asks the Court to deny Plaintiff's Motion for Summary Judgment. Defendant further respectfully requests any and all other relief to which it may be entitled.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 Phone
(512) 472-0532 Facsimile

By: */s/ Jose E. de la Fuente*
JOSE E. de la FUENTE
State Bar No. 00793605
jdelafuente@lglawfirm.com
JAMES F. PARKER
State Bar No. 24027591
jparker@lglawfirm.com
GABRIELLE C. SMITH
State Bar No. 24093172
gsmith@lglawfirm.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2026, I caused a true and correct copy of the foregoing to be transmitted by the Court's electronic filing system to the parties listed below:

Marvin W. Jones
marty.jones@sprouselaw.com
C. Brantley Jones
brantley.jones@sprouselaw.com
Sprouse Shrader Smith PLLC
701 S. Taylor, Suite 500
Amarillo, Texas 79105

Richard L. Coffman
rcoffman@coffmanlawfirm.com
The Coffman Law Firm
3355 West Alabama, Suite 240
Houston, Texas 77098

ATTORNEYS FOR PLAINTIFF

/s/ Jose E. de la Fuente
JOSE E. de la FUENTE