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	§	

PLAINTIFF'S [OPPOSED] MOTION TO STRIKE DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT (DKT. #78)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiff respectfully moves to strike Defendant Brazos Valley Groundwater Conservation District's (BVGCD) Second Motion for Summary Judgment (Dkt. #78) (filed May 19, 2026) on the grounds that (i) summary judgment briefing on both parties' dueling summary judgment motions is complete and closed, (ii) BVGCD's second summary judgment motion, in effect, is an unauthorized surreply to Plaintiff's summary judgment motion, for which BVGCD did not timely seek and obtain leave of court to file in violation of Local Rule CV-7(e), (iii) it is duplicative of BVGCD's summary judgment briefing in its response to Plaintiff's summary judgment motion and in BVGCD's first summary judgment motion (Dkt. #50) (BVGCD's second summary judgment motion revisits the same merits issues, relies on the same record, and even directs the Court back to its response to Plaintiff's summary judgment motion "for further discussion"), and (iv) BVGCD filed its second summary judgment motion for an improper purpose; to wit, it is designed to harass Plaintiff, cause unnecessary delay, unreasonably and vexatiously multiply the proceedings, and needlessly increase the cost of litigation because all the arguments submitted in

BVGCD's second summary judgment motion were clearly available to BVGCD at the time it filed its first summary judgment motion (Dkt. #50) and could have been included in it. Plaintiff should not be forced to spend time and resources responding to BVGCD's duplicative second summary judgment motion just because BVGCD feels a need to repeat its same arguments once more.

The timing, structure, and substance of BVGCD's second summary judgment motion (DKT. #78) make clear that it is not a genuine independent dispositive motion directed at previously undeveloped issues. Instead, it is a direct attempt to respond to—and obtain the last word concerning—Plaintiff's summary judgment reply brief filed on May 15, 2026.

BACKGROUND

On May 8, 2026, BVGCD filed its response (Dkt. #76) to Plaintiff's summary judgment motion, arguing that Plaintiff's taking claim fails because Plaintiff (i) alleges illegality, (ii) cannot satisfy *Penn Central*, (iii) cannot satisfy *Cedar Point*, (iv) lacks evidence of drainage or depletion, and (v) cannot rely on *Marrs*-style oil-and-gas concepts to prove a groundwater taking. Thereafter, on May 15, 2026, Plaintiff filed its summary judgment reply brief (Dkt. #77). A scant four days later (May 19, 2026), BVGCD filed its second summary judgment motion (Dkt. #78), advancing the same core merits themes and again arguing lack of economic-impact evidence, lack of investment-backed expectations, lack of physical invasion, lack of drainage or depletion, and lack of a viable *Marrs*-based theory. There is nothing new under BVGCD's sun.

BVGCD's second summary judgment motion self-proves its redundancy, instructing the Court: "For further discussion, see Defendant's Response to Plaintiff's Motion for Summary Judgment Dkt. 76, incorporated herein." BVGCD's second summary judgment motion (Dkt. #78) at 1 n.1. BVGCD's admission underscores the fact that its second summary judgment motion (Dkt. #78) is not a truly separate submission directed to a different issue set, but rather, it is an unauthorized surreply to Plaintiff's summary judgment motion, for which BVGCD did not timely

seek and obtain leave of court to file—in violation of Local Rule CV-7(e)—that is designed to harass Plaintiff, cause unnecessary delay, and needlessly increase the cost of litigation.

ARGUMENT

I. Local Rule CV-7(e) does not permit a respondent to file a second merits response brief (*i.e.*, a surreply) without leave of Court—which BVGCD did not timely seek or obtain.

Local Rule CV-7(e) contemplates a motion, a response, and a reply, providing that absent leave of court, no further submissions on the motion are allowed. BVGCD used its authorized response brief by filing its opposition (Dkt. #76) to Plaintiff's summary judgment motion. Having done so, BVGCD may not file a second merits response brief on the same summary judgment issues without first obtaining leave of Court—which BVGCD did not timely seek or obtain.

Although Dkt. #78 is captioned as a summary judgment motion, substance controls over form. *La. ex rel. Caldwell v. Allstate Ins. Co.,* 536 F.3d 418 (5th Cir. 2008); see also *Johnson v. Estelle,* 625 F.2d 75 (5th Cir. 1980). Where a later filing revisits the same arguments already made in response to an opponent's dispositive motion, relies on the same evidentiary record, and expressly incorporates the earlier response for "further discussion," it operates as an unauthorized surreply to the opponent's dispositive motion.

II. BVGCD's second summary judgment motion (Dkt. #78) duplicates the arguments it made in its first summary judgment motion (Dkt. #50) and in response to Plaintiff's summary judgment motion (Dkt. #76).

The overlap between these filings is substantial, (i) arguing that Plaintiff's takings theory is incompatible with Plaintiff's allegations that the amended rules are unlawful, (ii) contending that Plaintiff cannot satisfy *Penn Central* because there is no valuation evidence and no investment-backed expectations, (iii) rejecting any *Cedar Point* theory for lack of physical invasion, and (iv) arguing that any *Marrs*-style fair-share theory fails because there is no drainage or depletion evidence. The following comparison of BVGCD's summary judgment briefs confirms the repetition:

Issue / Theme	Doc. 50 – Rule 12(c)/Rule 56 MSJ (Nov. 7, 2025)	Doc. 76 – Response to Plaintiff's MSJ (May 8, 2026)	Doc. 78 – BVGCD MSJ (May 19, 2026)
Nature of Plaintiff's claim (what this case is)	Opens by stressing Plaintiff "has filed a constitutional takings claim, and only a takings claim. Not an equal protection claim. Not an ultra-vires claim. Just a takings claim," and argues that as pleaded it must be dismissed.	Calls Plaintiff's case an "improper, invalid takings claim," emphasizing that Plaintiff is really complaining the District "can't do that," not "can't do that without compensation," and that the theory sounds in illegality/fairness rather than a cognizable taking.	Frames the suit as a test case to graft oil-and-gas "confiscation by drainage" onto groundwater takings law; characterizes Plaintiff's theory as outside any recognized category (per se physical, regulatory under *Penn Central*, or exaction).

2. Illegality / ultra vires vs. takings	Central argument: Plaintiff's takings claim is built on the assertion that the rule amendments are "unlawful" and ultra vires under Texas Water Code chapter 36; under *Lingle*, a takings claim lies only for "entirely lawful" government action, so an ultra-vires act "can never" give rise to a taking.	Reiterates that Plaintiff repeatedly labels the amendments "unlawful," "wrongful," and ultra vires, including in discovery and prior filings, and argues that this illegality premise is "mutually exclusive" with a takings claim.	Again stresses that Plaintiff seeks a declaration that the rules violate Texas law and injunctive relief against applying them; repeats that challenges to validity/authority must be brought via appropriate state-law mechanisms, not through a federal takings claim premised on illegality.

3. Ripeness / Williamson County finality and § 36.251	Argues the takings "action" is the amendment of the Rules, but finality is lacking because Plaintiff has not used the specific review mechanism the Legislature created—Texas Water Code § 36.251 rule challenge—to adjudicate validity; cites *Williamson County, Urban Developers, Hidden Oaks*, and *Knick* to say the "final decision" requirement remains.	Incorporates Doc. 50's ripeness arguments and emphasizes that, because Plaintiff itself insists the rules may be unlawful, there is "necessarily an open question" how they apply; without a § 36.251 challenge, there is no final decision on legality or applicability to Plaintiff's tract.	Ties finality to injury on the merits: without evidence of economic impact, physical invasion, or drainage, there is nothing "final" or concrete to adjudicate; also underscores that a state-court § 36.251 proceeding would either invalidate the rules (making a takings claim unnecessary) or uphold them (precluding relitigation via res judicata).

4. No Penn Central or Cedar Point injury (injury and remedy themes)	Notes Plaintiff seeks only declaratory and injunctive relief—unusual for takings—and criticizes Plaintiff's shifting theory (per se vs. regulatory) while stressing that, because the claim rests on illegality, the court need not reach *Penn Central* or *Cedar Point* at all.	Argues Plaintiff has no appraisal, no evidence of diminution in value for the 69.41-acre tract, no investment-backed expectations, and that the rules still allow "generous" Simsboro production, defeating *Penn Central*; also notes there is no government-authorized physical invasion or easement within *Cedar Point*.	Emphasizes no measurable diminution in value, no reasonable expectations for a gifted, undeveloped tract in a heavily regulated field, and no compelled physical occupation or access; insists that, absent evidence of drainage/depletion, neither *Penn Central* nor *Cedar Point* can support liability.

5. Fair-share, equal-protection, and "two-tier" themes	Asserts Plaintiff is trying to "sneak" unpleaded equal-protection and ultra-vires claims into a takings case; notes Plaintiff's complaints about "differential status" and unequal treatment (old vs. new rules) sound in equal protection or § 36.101 "fair and impartial" requirements, not takings	Labels Plaintiff's fairness/differential-treatment theory—complaining about "two different production allocations based solely on an arbitrary calendar date"—as an unpleaded equal-protection claim and emphasizes that rules have always applied equally to everyone at any given time.	Reasserts that takings law has no comparative "fair share" element and that grievances about others pumping more water are, at most, equal-protection issues; adds that Day limits the right to exclude to more-than-ordinary drainage and that without drainage evidence there is no *Marrs*/"fair share" injury even if such analogies applied.

III. BVGCD's unauthorized and duplicative extra summary judgment brief is unnecessary and prejudicial and should be stricken.

BVGCD's second summary judgment motion operates as the type of brief precisely prohibited by Local Rule CV-7: an unauthorized surreply masquerading as a dispositive motion. The prejudice is straightforward. BVGCD fully opposed Plaintiff's summary judgment motion on May 8 followed by a second merits response brief on May 19, *after* Plaintiff filed its summary judgment reply brief, using the same record and advancing the same arguments without seeking leave of Court. By laying behind the log, BVGCD took an unauthorized extra opportunity to expand and restate its opposition after seeing Plaintiff's summary judgment reply brief.

Federal courts routinely prohibit parties from filing unauthorized surreplies absent leave of court because they unfairly prejudice the opposing party and disrupt orderly briefing procedures. *See, e.g.*, Local Rule CV-7(e) (permitting reply briefing but not surreplies absent leave); *Lacher v. West,* 147 F. Supp.2d 538 (N.D. Tex. 2001)(" Surreplies, and any other filing that serves the purpose or has the effect of a surreply, are highly disfavored, as they usually are a strategic effort by the nonmovant to have the last word on a matter.") (emphasis added); *Weems v. Hodnett,* No. 10-1452, 2011 WL 2731263, at *2 (W.D. La., July 13, 2011) ("Surreplies are heavily disfavored, as they usually are a strategic effort by the nonmoving party to have the last word on a matter.").

BVGCD never sought leave to file a surreply. Instead, after Plaintiff filed its summary judgment reply brief highlighting the dispositive constitutional defect in BVGCD's two-tiered groundwater regulatory system—namely, the simultaneous application of two materially different sets of groundwater production rules across the same aquifer—BVGCD simply repackaged its responsive arguments into a separately captioned "Motion for Summary Judgment."

CONCLUSION

For the foregoing reasons, and the fact that this is a groundwater *rights* case in any event, Plaintiff respectfully requests the Court to (i) strike BVGCD's second summary judgment motion (Dkt. #78), (ii) grant Plaintiff its excess attorneys' fees, expenses, and costs reasonably incurred to draft and file this motion to deal with BVGCD second summary judgment motion and unreasonably multiplying the proceedings, pursuant to 28 U.S.C. § 1927, and (iii) grant Plaintiff such other and further relief to which it is justly entitled.

Date: June 2, 2026

Respectfully submitted,

/s/ *Marvin W. Jones*
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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(g), on June 2, 2026, I conferred with counsel for Defendant BVGCD in a good-faith attempt to resolve this motion, by agreement, before filing it. Defendant's counsel stated that opposes Plaintiff's motion to strike. As such, I hereby certify that no such agreement could be made with Defendant's counsel.

/s/ *Marvin W. Jones*
Marvin W. Jones

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2026, I served a true and correct copy of Plaintiff's [Opposed] Motion to Strike Defendant's Second Motion for Summary Judgment (Dkt. #78) on Defendant's counsel via email and the Court's electronic filing system.

/s/ *Marvin W. Jones*
Marvin W. Jones