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 GROUNDATER CONSERVATION DISTRICT'S RESPONSE TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Defendant Brazos Valley Groundwater Conservation District (the "District") submits this Response in Opposition to Plaintiff Fazzino Investments, LP's ("Plaintiff") Motion For Class Certification (hereafter, "Pl.'s Mot.") (Doc. 31). In support thereof, the District respectfully states the following:

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EXECUTIVE SUMMARY

The purported takings case pleaded in the Complaint should not be before this Court as *any* federal action, much less as a Rule 23 Class Action. Plaintiff's Complaint asks this Court to enjoin the District's amended Rules because it contends they are "unlawful" in that they violate Texas law. The predicate question that must be answered is thus "was the District's amendment of its Rules illegal/unlawful according to Texas law?" But if the act of a governmental entity is unlawful, *that act cannot effectuate a taking* (only an *otherwise legal* act of a governmental entity can form the basis of a takings claim). So, what Plaintiff has pleaded in its Complaint is not and cannot be a takings claim.

Second, the claim in the Complaint—even if proper—would not be ripe, because Plaintiff has not established the necessary "finality" predicate. The "takings action" here is the District's amendment of its Rules. But that decision has not been finally adjudicated as to its legality/validity—which Plaintiff plainly contests—because Plaintiff ignored and actually avoided a direct mechanism for review to obtain a final decision as to the act purportedly causing the taking: a suit under Texas Water Code Section 36.251 to challenge the validity of the Rules.

Plaintiff's decision to attack the amended Rules as violating Texas law (via a type of claim that doesn't allow for adjudication of that question), while skipping the exact mechanism created under Texas law to obtain a final determination of that very question, renders this case a non-starter in this Court. In short, Plaintiff either pleaded itself *out of* a valid takings claim, or *into* an unripe takings claim, or both.

Plaintiff then compounds bringing an improper claim by seeking certification of an overly broad class of all landowners who own over 35 contiguous acres over the Simsboro aquifer within the District's boundaries. All landowners are included: (1) from 35 acres to 3,500 acres; (2) whether there is a nearby large-volume well or not; or (3) whether a landowner had some reasonable investment-backed expectations or none. The overbreadth of that putative class naturally and necessarily negates the elements of typicality, adequacy/lack of antagonism, and commonality required under Rule 23, and further would lead to a grant of relief that is not indivisible and uniform.

This case is really a challenge to the District's Rules on the basis that, as amended, they violate Texas law, specifically including multiple provisions of Chapter 36 of the Texas Water Code. That fact renders it an improper and/or unripe takings claim, and thus improper for class certification. In addition to that foundational defect, Plaintiff's failure to plead and prove an appropriately specific putative class with the requisite typicality, lack of antagonism, and commonality among putative class members means that certification of the specific class requested would be improper under the Rules. Plaintiff's Motion should be denied.

STANDARD OF REVIEW

While the determination of class certification "rests within the sound discretion of the trial court," that discretion "must be exercised within the constraints of Rule 23." *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005), citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). The party seeking class certification carries the full burden of showing that each requirement is met with real evidence, not just unsupported factual

allegations and attorney advocacy. *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020) ("[C]ourts must certify class actions based on proof, not presumptions."). That means proving all four conjunctive prerequisites under Rule 23(a)—numerosity, commonality, typicality, and adequacy—and then showing that the case fits into one of Rule 23(b)'s buckets. If Plaintiff fails to prove even one of those elements, class certification is improper.[1]

ARGUMENT AND AUTHORITIES

Plaintiff' purports to have brought a takings class action. The problem is that it is neither (1) a valid, ripe takings case nor (2) a proper class action.

Plaintiff complains about the same act (the District's amendment of its Rules) two separate ways, invoking two separate takings theories. Plaintiff has pleaded "both a *per se* and a regulatory taking because of BVGCD's . . . rule changes." (Pl.'s Mot. at 9.) Importantly, both theories arise from the District's amendments of its Rules, which Plaintiff alleges did not just bring about a taking, but were "unlawful." (*See, e.g.,* Doc. 1, ¶¶ 1, 15, 16, 24, 26, 30.)[2]

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[1] The Fifth Circuit reversed the trial court in *Flecha*, emphasizing that a plaintiff must "affirmatively demonstrate" each element and holding that the trial court erred in presuming key requirements were satisfied. *Id.* The Fifth Circuit has highlighted the imperative that the trial court look at the pleadings and beyond to perform a rigorous analysis to determine if the requisite elements of Rule 23 are satisfied. *Bell v. Ascendant Sols., Inc.*, 422 F.3d 307, 311–316 (5th Cir. 2005).

[2] Specifically, Plaintiff alleges that the District's amendments of its Rules are unlawful because they violate Texas law, *e.g.*: the formula in the rules requiring circular allocation boundaries "is not authorized under Texas Water Code Chapter 36" (Responding Party's Position, August 27, 2025 Discovery Dispute Chart, p. 8); the Rule 6.1 spacing requirements were not "based on the best available science . . . and thus are not fair and impartial as required by Tex. Water Code § 36.101" (*Id.*); and the amended Rules do not treat all landowners "fairly and the same . . . which, under Texas law (*e.g.*, Tex. Water Code § 36.101(a)(2)), BVGCD is obligated to do." (Pl.'s Mot., p. 12). The District requested in

First, a 42 U.S.C. § 1983 takings claim based on the government action of a Texas groundwater district passing allegedly "unlawful" rules is not a thing; it is neither a recognizable takings claim nor a ripe claim. Rather, a challenge to the validity of the rulemaking action of a groundwater district in Texas must proceed under a mechanism for review and relief created by the Texas legislature for the express purpose of answering that very question: a suit for judicial review under Texas Water Code Section 36.251. Plaintiff's attempt to plead a "takings" claim that isn't a takings claim at all fails at its inception, also demonstrating its impropriety as a class action.

And even if the Court were presented with an actual justiciable claim, class actions aren't automatic. They're the rare exception to the rule that folks stand on their own two feet in court. The Supreme Court said it straight: class certification is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).

Plaintiff purports to bring this action on behalf of itself and "all similarly situated landowners." (Doc. 31 at 1.) Plaintiff posits that they are:

> All individuals and entities that own land in Brazos and Robertson Counties, Texas, over the Simsboro Aquifer of at least 35 contiguous acres that do not have a pre-September 14, 2023, groundwater well permitted or drilled on their acreage.

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discovery that Plaintiff state all bases for its allegation that the Rule amendments were "unlawful," and full responses to that discovery are due on October 16, 2025, pursuant to this Court's October 8, 2025 Order. (Doc 38.) Notably, Plaintiff's Motion does not and cannot cite any class-action takings case in which the legality of the government action was a question to be decided in that proceeding.

(Doc. 31 at 2.) Although framed as a single group, when viewed in the context of Plaintiff's Complaint, that definition invites landowner-specific inquiries, creates internal conflicts, and violates Rule 23's class certification standards.

Rule 23(a) states that as a prerequisite to class certification, one must show that:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Plaintiff's proposed class is vastly overbroad and ill-defined, sweeps in putative members who are not harmed, and includes putative members who may stand at odds with one another.[3] Plaintiff's Complaint itself negates several of the requisite elements. Add to that a named Plaintiff that's not in the same boat as the other folks it claims to represent, and this case falls well short of the requirements of Rule 23.

A. Plaintiff's Complaint precludes any valid, ripe takings claim, and thus cannot support class certification for such a claim.

Plaintiff pleads *only* a constitutional takings claim, and seeks *only* declaratory and injunctive relief. (*See* Doc. 1, ¶¶ 1–2.) The problem is that the case pleaded in the Complaint is neither fish nor fowl.

[3] The Court might be tempted to try to work out an answer to the question of "well, what *would* be an appropriate, not-overbroad class?" But that is not the Court's job; the Court is not called to guess at how a class could be better-defined. Instead, the Plaintiff carries the full burden of establishing a valid class. *Flecha*, 946 F.3d at 768.

That is, if the District acted *unlawfully*, then that act cannot be the basis for a takings claim, because takings claims can only be brought for failure to compensate a plaintiff for harm caused by an "otherwise proper interference" with its property rights. Alternatively, as Plaintiff's takings claim is predicated on the alleged invalidity of the District's Rule amendments, that claim is not ripe because Plaintiff has not availed itself of the specific state-law mechanism of review necessary to answer and establish that predicate: a challenge to the validity of the amended Rules under Texas Water Code Section 36.251.

1. An "unlawful" act cannot be the basis of a takings claim.

Plaintiff's Complaint alleges that by "unlawfully amending Old Rules 6.1 and 7.1 to create New Rules 6.1 and 7.1" the District affected a "taking [of] Plaintiff's and Class Members' groundwater property rights." (Doc. 1, ¶ 38.) That is, the thing that the District did, and that caused the alleged taking without just compensation, was the District *unlawfully* amending its Rules. That is exactly the matter that Plaintiff asks this Court to decide, or perhaps even assume: that the District's amendment of its Rules was "wrongful." (*See* Doc. 1, ¶ 25(i).)

But an unlawful act by the government *cannot form the basis of a takings claim*; only a legal act by the government can do so. *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 543 (2005) (An inquiry into a "regulation's underlying validity . . . is logically prior to and distinct from the question whether a regulation effects a taking . . ." because the Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper*

interference amounted to a taking.'") (quoting *First Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S.304, 315 (1987) (emphasis added).[4] That is, a takings claim can only be predicated on an "otherwise proper interference" with property rights. Conversely, if the act of the government was improper in some way, then it cannot effect a taking. If the act was unlawful, then it may be addressed by some other mechanism, but *not* by a takings claim. However, a 42 U.S.C. § 1983 takings claim (1) is the sole cause of action brought here, and (2) is consistently predicated on an assertion that the District's actions were unlawful and thus *not* an "otherwise proper interference" with Plaintiff's property rights. Thus, there is no valid takings claim upon which Plaintiff can stand, much less dragoon thousands of putative "class members" into joining.

2. Plaintiff's abandonment of a specific statutory form of review and relief renders its attempted takings claim unripe due to lack of finality.

Plaintiff's decision not to attack the District's amendments as "unlawful" by some other cause of action or mechanism was no accident; Plaintiff is trying to avoid

[4] Injunctive relief for a takings claim is not typically available and likewise is improper here. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28 (1985) ("[I]n general, '[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duty authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.'") (cleaned up). After all, taking property is not unconstitutional; only taking it without just compensation is. *First Evangelical Lutheran Church*, 482 U.S. at 314. But determining any uncompensated value here—first as to each individual property, then to calculate the purported "devaluation" caused to the putative class as a whole—requires parcel-by-parcel analysis of loss "to the parcel as a whole." *See Murr v. Wisconsin*, 582 U.S. 383, 395–406 (2017). That individualized inquiry alone makes this case, seeking injunctive relief, improper for class treatment.

the established form of review of the validity of District Rules: a Texas Water Code Section 36.251 challenge to the validity of a District rule.

To be actionable, a takings decision by a government entity must be final. *Urban Developers v. City of Jackson*, 486 F.3d 281, 292–93 (5th Cir. 2006) (citing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)).[5] Specifically, "whenever the property owner has ignored or abandoned some relevant form of review or relief, such that the takings decision cannot be said to be final, the takings claim should be dismissed as unripe." *Id.* at 293.

Plaintiff here has purposefully ignored and avoided the specific mechanism "of review or relief" created by the Texas Legislature to answer the exact question of rule validity Plaintiff beseeches this Court to answer: a rule challenge under Texas Water Code Section 36.251. Subchapter H of Chapter 36 of the Texas Water Code provides for judicial review of any act of a district. Tex. Water Code §§ 36.251–.254. Section 36.251 provides that any entity "affected by and dissatisfied with any rule or order made by a district" is entitled to file suit "to challenge the validity of the . . . rule or order," with such suit to be filed in state court in the county in which the district is located. Tex. Water Code § 36.251(a), (c). In such suits, the plaintiff has the burden of proof, the challenged law is deemed prima facia valid, and the matter is reviewed under the "substantial evidence rule" (a difficult bar to clear). Tex. Water

[5] *Williamson County* imposed two predicates to ripeness of a takings claim: (1) finality of the government's decision, and (2) the plaintiff has sought compensation for the taking through any procedures the state provides. *Williamson County*, 473 U.S. at 186. Importantly, while the Supreme Court's decision in *Knick v. Township of Scott* overruled the second predicate (plaintiff must seek compensation), it left the first predicate (finality of the decision) undisturbed. 588 U.S. 180, 188 (2019).

Code § 36.253; Tex. Gov't Code § 2001.174. Additionally, should the district prevail in such suit, it is entitled to recover its attorney's fees. Tex. Water Code § 36.066.

It thus is understandable why Plaintiff might want to avoid the mechanism of review created by the Legislature to adjudicate its claim that the District's amendment of its rules was "unlawful," but takings law does not allow such an end-around. *Urban Developers,* 486 F.3d at 293. This *Williamson County* "finality" requirement also is consistent with the principle that the question of a regulation's validity must be answered first. *Lingle,* 544 U.S. at 543 (An inquiry into a "regulation's underlying validity . . . is logically prior to and distinct from the question whether a regulation effects a taking . . ." (citing *First Evangelical Lutheran Church*, 482 U.S. at 315)).

The "finality" ripeness predicate is particularly important here, where a final decision on the applicability of the District's amended Rules via the requisite Section 36.251 suit would be entirely dispositive of the dispute. Either (1) the District's amended rules will be found to be invalid, in which case they will no longer stand and neither the Plaintiff nor anyone else will have to operate under those rules, *or* (2) the amended rules will be found valid, and any further claim by Plaintiff's that it has been harmed by an "unlawful" act will be barred by *res judicata*. The prudence of both the rule that validity of a regulation must be decided prior to bringing a takings claim and the finality requirement is borne out by that decision tree.

B. Plaintiff fails to establish the elements of typicality, adequacy, and commonality, which are required for class certification.

1. Plaintiff is not a "typical" representative of the putative class.

To satisfy the "typicality" requirement for class certification, Plaintiff must establish the existence of a class of persons who have suffered the same injury as Plaintiff, such that the claims of Plaintiff and the putative class share common questions of law or fact, and that Plaintiff's claim will be typical of the class claims. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157–158 (1982)). Plaintiff alleges each putative class member faces the same injury: the District's 2023 rule amendments take and devalue groundwater rights "based on the same government policy . . . which is unlawful as to the *entire* proposed class." (Doc. 1, ¶ 15, emphasis added.) Comparing the amended Rules to their prior iteration, Plaintiff alleges that permitting a 700 GPM well under the old set of rules would have previously required groundwater rights to 35 acres, but under the amended Rules, that same 700 GPM well would now require groundwater rights to 141 acres. (*Id.*) Plaintiff uses a 700 GPM well as the example of the injury facing the entire putative class because Plaintiff contends that "the economic minimum production for drilling a well into the Simsboro aquifer for municipal or industrial purposes is 1,100 acre-feet per year, which requires a well producing around 700 GPM." (*Id.*)

The putative class includes *all* landowners in the District's boundaries who own or control the groundwater rights to at least 35 contiguous acres. (Pl.'s Mot. at 2.) By Plaintiff's own admission, the putative class would include landowners who have access to <u>more</u> than 141 acres, which as Plaintiff calculates are landowners

armed with the ability to drill a fundamentally different well than other wells drilled on smaller tracts. The putative class even includes some of the largest landowners in the District, who could drill multiple wells capable of producing groundwater at rates orders of magnitude above the minimum threshold to have an "economically viable" well. (Ex. A, Decl. of A. Day at ¶ 3.) That fact alone defeats Plaintiff's argument that the purported injury to Plaintiff (and its ownership of a 69-acre tract) is "typical," as class members owning more than 141 acres will still be able to drill "economically viable" wells. Plaintiff also fails to account for how neighboring landowners could combine/pool their groundwater interests by (for example) mutual agreement or by leasing to a third-party entity, which would then be able to drill an "economically viable" well.[6] Plaintiff can't claim that the amended Rules prevent the entire putative class from being able to drill "economically viable" wells if many members of that putative class are able to do so under those Rules.

Plaintiff further alleges that "Plaintiff and Class Members have reasonable, investment-backed expectations" that have been "thwarted" by the District's Amended Rules (Doc. 1, ¶ 38), further complaining that the District's Rule amendments have decreased the economic value of their water rights. (Doc. 1, ¶ 20.) Analyzing the reasonable investment-backed expectations and water-rights value of the putative class as a whole is (1) impossible and (2) an improper attempt to try to

[6] *See, e.g.*, District Rule 1.1(8) and Rule 8.4(b)(3) (excerpts from the District's Rules showing each such Rule attached hereto as Ex. B), providing that an applicant need only show the right to own *or control* the relevant groundwater rights. That is, someone who does not own sufficient surface acreage may nonetheless acquire by any number of mechanisms the right to control sufficient acreage for a particular permit application.

plead two distinct and separate categories of takings claims in a mutually exclusive manner. Plaintiff pursues and depends on elements of a regulatory takings claim (but then disclaims that theory) as it pursues a *per se* "physical invasion" takings claim. Plaintiff can't plead two interdependent theories but deem them mutually exclusive. Such approach necessarily precludes any finding of "typicality."

Plaintiff pleads at times that the amended Rules amount to a physical taking of each putative class member's property—a *per se* physical takings claim. Analysis of a class member's investment-backed expectations might not be a consideration if Plaintiff had pleaded only a *per se* physical takings claim. Physical takings claims are different than regulatory takings claims, as the former involves determining whether the government has physically invaded an individual's property, whereas the latter involves an analysis of whether a government regulation has restricted an individual's ability to use their property as desired, with such evaluation done under the balancing-test articulated in *Penn Central*. See *United Water Conservation Dist. v. United States*, 133 F.4th 1050, 1055–1056 (Fed. Cir. 2025) (citing *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 at 124 (1978)). The Supreme Court recognizes the differences between these kinds of claims, noting how

> [t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings . . . Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U.S. at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo*, 533 U.S. at 636 (O'CONNOR, J., concurring) . . . . For the same reason that we do not ask whether a

> physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims . . . . physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights."

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–24 (2002).

However, Plaintiff's *per se* takings claim depends on the regulatory takings elements pleaded: Plaintiff pleads that the District's amended Rules have thwarted the putative class members' investment-backed expectations, devalued the economic use of their property, and are subjecting them to "drainage" precisely *because* they are unable to drill an "economically feasible" well. (Doc. 1, ¶¶ 16, 18.) Thus, Plaintiff (1) is bound to the regulatory takings claim pleaded and relied upon in support of its Motion for Class Certification, and (2) therefore must prove that each member of the putative class has investment-backed expectations that are typical of the class. That is, of course, impossible: regulatory takings claims involve an ad-hoc, factual inquiries into *each specific* investment-backed expectation at issue to weigh all the relevant circumstances. *See Penn Central*, 438 U.S. at 124; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001). There is no practicable way to certify the putative class of persons who may have suffered a regulatory taking; while the regulations at issue might be common to all putative class members (they indeed apply to everyone equally), every other factor and element is unique as to each of them.

Inquiry into the investment-backed expectations of one landowner's groundwater estate may reveal a completely different set of reliance interests from

another landowner—for example, why did you acquire your property, and what did you pay for it? The number of permutations of different investment-backed expectations among the putative class is equal to the number of class members. Plaintiff cannot even establish whether the amended Rules thwarted *its own* investment-backed expectations, as Plaintiff actually wishes to develop an economically viable well producing less than 1,100 acre feet per year for a residential development. (Ex. A at ¶¶ 5–7). Because there must be an inquiry into the unique individual investment-backed expectation of each putative class member, Plaintiff cannot establish typicality.

2. Plaintiff is not an adequate representative of the putative class because its interests are antagonistic to the interests of others.

Plaintiff argues its interest in the pending class action is not antagonistic to, or in conflict with, the interests of all members of the putative class. (Pl.'s Mot. at 14.) To satisfy the requisite "adequacy" element, Plaintiff must possess the same interest and suffer the same injury as the class members. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625–26 (1997). The Fifth Circuit noted how it is self-evident that a "'putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent.'" *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 810 (5th Cir. 1982) (cleaned up).

Plaintiff's interests in the pending class action are not representative of, and are in fact at odds with, at least some of its fellow putative class members. As an example, Plaintiff alleges that certain tracts (those over 141 acres) can drill wells of 700 GPM or greater when other smaller tracts cannot. This discrepancy will

purportedly result in those larger tracts "draining" groundwater from neighboring smaller tracts. (Doc. 1, ¶¶ 18, 19, 35, 45, 47, 48, 50.) However, presuming the validity of Plaintiff's allegations, members of the putative class with groundwater rights to at least 141 acres *are* in fact able to drill the kind of well Plaintiff claims will "drain" neighboring lands—some of which would belong to other landowners in the putative class—creating the very conflict between members of the putative class, with an alleged advantage of one group of putative class members over another.[7]

Inherent in the putative class as pleaded are antagonistic interests, both physical and economic, between those who can still drill a 700 GPM well under the District's amended Rules and those who cannot do so without pooling/combining their tracts, such as Plaintiff. Plaintiff cannot satisfy the "adequate class representative" requirement as to the entire putative class in light of that irreconcilable conflict.

3. The purported class lacks the requisite commonality.

According to Plaintiff, there is commonality because anyone who doesn't already have a well is equally harmed by the District's Rule amendments, no matter the shape, size, or use of their land, and regardless of whether they ever even wanted a well.

That is incorrect. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]' This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*,

[7] On top of that, Plaintiff complains that "landowners with pre-September 14, 2023 wells . . . are draining Plaintiff's and Class Member's land . . ." (Doc. 1, ¶ 18.) That is, Plaintiff contends that landowners with pre-September 14, 2023 wells are antagonistic to all putative class members. Problematically, *Plaintiff is one of those landowners with pre-September 14, 2023 wells* (on other tracts Plaintiff owns within the District). (Ex. A at ¶ 4.)

564 U.S. 338, 349–50 (2011). But that's all that Plaintiff has alleged here. (Pl.'s Mot. at 12 (alleging that claims are based on "single course of conduct," namely the District enacting its amended Rules)). Everyone in the District is indeed bound by the same rules, irrespective of the particularities of any parcel or person, but that legal fact doesn't satisfy the Plaintiff's burden.

According to Plaintiff, the following "common questions" overlay the "common injury" here:

> i. whether BVGCD's wrongful actions violated (and continue to violate) the Fifth Amendment to the United States Constitution;
>
> ii. whether BVGCD's wrongful actions violated (and continue to violate) 42 U.S.C. § 1983;
>
> iii. whether BVGCD's wrongful actions constitute a taking and directly and/or proximately caused (and continue to cause) Plaintiff and the putative class members to suffer injury and harm to their groundwater property rights;
>
> iv. whether Plaintiff and the putative class members are entitled to declaratory relief; and
>
> v. whether Plaintiff and the putative class members are entitled to injunctive relief.

(Pl.'s Mot. at 12.) But commonality isn't just asking the same question—it's getting the same answer. The "commonality requirement demands more than the presentation of questions that are common to the class because 'any competently crafted class complaint literally raises common questions.'" *M.D. v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012).

Plaintiff asserts that *everyone* suffered the "same injury" from the amended Rules, but that is not and cannot be true; the purportedly "common questions" raise fact-specific inquiries that necessarily generate different results from landowner to landowner. For

example, these questions presuppose injury based on the assumption that all members of the putative class have objections to the Rules, experience excessive drainage, etc. But that is not a matter common to every member of the purported class. Some landowners may want to pump more than others; some landowners may not be suffering any "drainage;"[8] some landowners may prefer the amended Rules and their goal of preserving the District's desired future conditions of the aquifer underlying their land. Whether and how the rule amendments matter to a given landowner necessarily depends on factors including but not limited to:

- Tract acreage (e.g., 35 acres vs. 350 or 3,500 acres);
- Property shape (circle vs. rectangle vs. irregular);
- Location relative to existing pre-rule-amendment wells; and
- Economic feasibility of drilling at all.

These are not common questions with common answers. They're individualized mini fact-finding determinations.[9] And those individualized determinations overwhelm

[8] The existence and amount of any "drainage" is necessarily a factual, location-specific inquiry. *See* Memorandum Opinion and Order at 11–12, *BLF Land, LLC v. North Plains Groundwater Conservation Dist.*, No. 2:23-CV-133-Z (Nov. 13, 2024) (Examining a complaint of "drainage" functionally identical to the complaint in this case, the court required evidence of "the relative disparity between plaintiff's land and their neighbors'" to prove any alleged drainage. The court noted that under Texas law, while a landowner may exclude others from groundwater beneath their land, that right does not bar ordinary drainage and holding that at the very least, one must present evidence of "the relative disparity between Plaintiff's land and their neighbors'" with respect to the degree of any alleged drainage. The court did so in the context of applying Texas law, which holds that "'a landowner has the right to exclude others from groundwater beneath his property, but one that cannot be used to prevent ordinary drainage.'" (citing *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 830 (Tex. 2012)) (Memorandum Opinion attached as Ex. C.)

[9] For example, a central allegation of the Complaint is that "wells drilled on land next to tracts owned by Plaintiff and Class members" under the pre-September 14, 2023 Rule amendments "are draining Plaintiff's and Class Members' land." (Doc. 1, ¶ 18.) However,

and are inextricably intertwined with the "common questions" set out in Plaintiff's Complaint and Motion. *See Wal-Mart Stores, Inc.*, 564 U.S. at 350 (commonality requires that a common contention "resolve an issue that is central to the validity of each one of the claims in one stroke"). The Fifth Circuit has long held that if the case boils down to individualized issues, a class action just won't work. *See M.D. v. Perry*, 675 F.3d 832, 839–40 (5th Cir. 2012) (vacating certification where claims were "highly individualized" and lacked a common answer); *see also Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002) (differences between named plaintiff's claims and those of the class defeat commonality).

Further, a case that relies on diminution of individual property value based on physical invasion is not appropriate for class certification. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ('[A]s claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases."). That is exactly what is pleaded here: the amended Rules "substantially devalued Plaintiff's and Class Member's groundwater property rights . . ." (Doc. 1, ¶ 26.) Here, valuation is an individual analysis as to each individual tract, including evaluation of the specific neighboring properties and activity. Plaintiff would rope in every landowner in Brazos and Robertson Counties, whether they own thousands of acres and are looking to drill, own irregularly platted property surrounded by other

determining whether there actually are such wells "next to" any specific tract owned by Plaintiff or any specific putative class member requires location-specific factual inquiry.

drilling properties, or some other combination of factors. That's not a class—that's a census.

C. Rule 23(b)(2) certification is improper because the requested relief is neither indivisible nor uniform.

Not only must a party seeking class certification establish each element of Rule 23(a), the movant must also show that class certification is appropriate under Rule 23(b), specifically Rule 23(b)(2) in this instance. (*See* Doc. 31 at 18.)

Rule 23(b)(2) is a narrow path. It applies only when a single injunction or declaratory judgment would provide the same relief to every class member. *Wal-Mart Stores, Inc.,* 564 U.S. at 360. The rule was built for situations where "one stroke of the pen" fixes the same wrong for everyone. For example, a company-wide discrimination policy or a uniform prison condition. *See Yates v. Collier*, 868 F.3d 354, 366 (5th Cir. 2017). It is not, however, meant for regulatory disputes where different people are affected in different ways.

While every landowner with the same size and shaped tract would have the exact same ability to obtain a well permit,[10] the landowners in the putative class do *not* have identical sized and shaped tracts. Based on the Complaint, and the factual disparities among the thousands of landowners in the putative class as discussed here and above,

[10] The District's Rules have always applied equally to landowners at any given moment in time; apropos of this case, every landowner had an opportunity to seek a well permit subject to pre-amendment Rules 6.1 and 7.1 up to and through September 14, 2023, and every landowner has had the opportunity since that date to seek a well permit subject to post-amendment Rules 6.1 and 7.1. Because each landowner has been treated the same at any given time, that is equal treatment. *See* Order at 5, *Fazzino v. Roe, et al.*, No. 6:18-CV-00114-JCM (Aug. 23, 2021) (finding that a similar "temporal break" between comparators defeated an allegation of unequal treatment). (Order attached as Ex. D.)

each landowner would have a different "injury" (or quite often, none at all) that would be "cured" by the requested injunction.

Rule 23(b)(2) simply doesn't fit when relief would benefit some class members but not others. *See Wal-Mart Stores, Inc.*, 564 U.S. at 360 (The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."). The Fifth Circuit has echoed this limit. *See M.D. v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018) (Rule 23(b)(2) relief must be "cohesive"). Where proposed injunctive relief "requires case-by-case determinations" or "different enforcement effects," class certification under Rule 23(b)(2) fails.

Because the requested injunction would not provide the same relief to all class members, the proposed class cannot be certified under Rule 23(b)(2).

CONCLUSION AND PRAYER

Rule 23 sets a high bar for a reason: class certification changes the stakes, the leverage, and the fairness of a lawsuit. It starts with the claim pleaded in the Complaint, and the defective and deficient claim here cannot support class certification. Even if it could, Plaintiff has the burden of proving the putative class satisfies all the requisite elements of Rule 23. However, the Complaint itself raises numerous issues that are putative class member-specific. Plaintiff pleaded a case that necessarily means that Plaintiff cannot meet its burden. This Court should deny Plaintiff's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2025, 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:

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