

**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 RESPONSE IN OPPOSITION TO DEFENDANT’S  
RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR  
RULE 56 MOTION FOR SUMMARY JUDGMENT**

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**TO THE HONORABLE UNITED STATES DISTRICT COURT:**

Plaintiff Fazzino Investments, LP (“Plaintiff”), for itself and all others similarly situated, files this Response in Opposition to Defendant’s Rule 12(c) Motion for Judgment on the Pleadings and/or Rule 56 Motion for Summary Judgment, and respectfully shows the following:

**INTRODUCTION**

On the heels of briefing Plaintiff’s class certification motion, Defendant Brazos Valley Groundwater Conservation District (“BVGCD” or the “District”) re-packages its arguments in the form of a Motion to Dismiss/Motion for Summary Judgment. For the reasons set forth in Plaintiff’s class certification motion and corresponding reply brief, which Plaintiff incorporates by reference, the current version of BVGCD’s tired arguments also should be rejected.

That said, two specific lines of BVGCD’s arguments bear a direct response: BVGCD’s unusual reliance on overruled cases in support of its “ripeness” claim, and BVGCD’s fixation on the word “unlawful” and its implications in the takings context.

**ADDITIONAL UNDISPUTED AND INDISPUTABLE MATERIAL FACTS**

Plaintiff is a Texas limited partnership that owns a 69-acre tract of land in Robertson County, Texas, over the Simsboro Aquifer that does not have a pre-September 14, 2023, groundwater well permitted or drilled on the acreage. July 16, 2025, Rule 30(b)(6) Deposition of Alan Day, BVGCD’s General Manager and corporate representative (“Day Depo.”) (Exhibit A) at 149:9-18; Declaration of Charles Fazzino (“Fazzino Decl.”)<sup>1</sup> (Exhibit B), ¶ 2.

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<sup>1</sup> The Declarations of Charles Fazzino (Exhibit B) and Mike Thornhill (Exhibit C) were originally submitted in support of Plaintiff’s Motion for Class Certification (ECF No. 31). The facts to which these declarations attest are equally viable here. As such, Plaintiffs also submit these declarations in support of this Response in Opposition to Defendant’s Rule 12(c) Motion for Judgment on the Pleadings and/or Rule 56 Motion for Summary Judgment.

Plaintiff desires to sell its groundwater production rights to a commercial groundwater production company. *Id.* But because of the amendment of BVGCD's Rules on September 14, 2023,<sup>2</sup> drilling a commercial water well on Plaintiff's property is not economically feasible. *Id.*

The production of groundwater in the District is specifically governed by well spacing requirements (Rule 6.1) and production limits (Rule 7.1).

Groundwater well spacing requirements are instituted "[t]o minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water quality, and to prevent waste." Rule 6.1(a).

The District enforces the groundwater well spacing requirements under the current Rule 6.1 ("New Rule 6.1") on all new wells for which the registration or permit was approved after September 14, 2023. Wells permitted or registered on or before September 14, 2023, are regulated by the spacing requirements of the prior version of Rule 6.1 ("Old Rule 6.1").

Under Old Rule 6.1(b)(2), all new groundwater wells drilled in the District were required to be surrounded by only one (1) foot of land per one gallon per minute ("GPM") of average annual production rate or capacity. Under New Rule 6.1(b)(2), which became effective on September 14, 2023, all new groundwater wells drilled in the District must be surrounded by two (2) feet of land per one GPM of average annual production rate or capacity.

BVGCD Rule 7.1 institutes groundwater production limits for new wells "[t]o minimize as far as practicable the drawdown of the water table and the reduction of artesian pressure, to control subsidence, to prevent interference between wells, to prevent degradation of water

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<sup>2</sup> BVGCD's Rules, Revised and Adopted on September 14, 2023, may be found at File Browser | Brazos Valley Groundwater Conservation District (last visited on Nov. 15, 2025).

quality, and to address the potential loss of opportunity to drill a new well because of spacing requirements, and to prevent waste.” *Id.* A new well’s groundwater production:

[I]s limited by the number of contiguous acres that are legally assigned to the well site. The contiguous acreage assigned to the well bears a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science and the required production based acreage. The assigned contiguous acreage will be a circle based on the amount of groundwater production determined by the following formula:

$$\frac{\left( \begin{array}{l} \text{Average Annual} \\ \text{Production Rate} \\ \text{in Gallons/Minute} \end{array} \times \begin{array}{l} \text{District Spacing} \\ \text{Requirement} \\ \text{Between Wells} \end{array} \right)^2 \times \pi}{43,560} = \begin{array}{l} \text{Total number of} \\ \text{contiguous acres} \\ \text{required to be assigned} \\ \text{to the well site} \end{array}$$

Rule 7.1(c). The “District Spacing Requirement Between Wells” variable in the above formula is the plug-in number from Rule 6.1(b)(2)—one (1) foot of land under Old Rule 6.1(b) and two (2) feet of land under New Rule 6.1(b)(2).

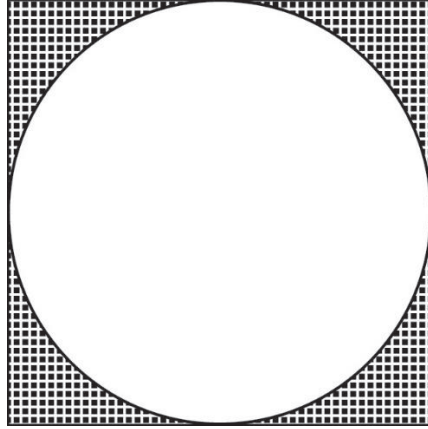
Under the Old Rule 6.1(b) one-foot spacing requirement, for each one (1) GPM produced by a groundwater well, a landowner had to own or control a circle of land around the wellbore with a radius of one (1) foot. Thus, if a landowner had a 3,000 GPM well, under Old Rule 6.1(b), the landowner had to own or control land around the wellbore in a circle with a radius of 3,000 feet—or a circular area of 649 acres. Thus, a circular section of land (640 acres) could support a 3,000 GPM well.

On September 14, 2023, BVGCD changed the Rule 6.1(b) spacing requirement. So, to drill a new 3,000 GPM well under the New Rule 6.1(b) two-foot spacing requirement, per the above formula, a landowner must own or control 2,596 acres around the wellbore. *See* Declaration of Mike Thornhill (“Thornhill Decl.”) (Exhibit C), ¶ 7. That’s four times as much land necessary to produce the same amount of groundwater. *Id.* Under Old Rule 6.1(b), a 700 GPM well required only 35 acres surrounding the wellbore. *Id.* But under New Rule 6.1(b), 141

acres are required to drill the well. This is pertinent, for example, because 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.*

New Rule 6.1(b) reduces the amount of groundwater Plaintiff and class members may produce from post-September 14, 2023, by 75%. Thornhill Decl., ¶¶ 7, 8. Stated another way, the New Rules devalue Plaintiff’s and putative class members’ groundwater rights to 25% of what they were before the District changed Rule 6.1(b). Considering that the typical water well costs well over \$1 million to drill, the practical effect of BVGCD’s rule change is to make prospective wells that were economically feasible to drill under Old Rule 6.1(b) no longer economically feasible to drill under New Rule 6.1(b). *Id.*

After September 14, 2023, New Rule 7.1(c)(1) also prohibits new wells from having a “contiguous acreage circle” that overlaps with any other well in the same aquifer. Thornhill Decl., ¶ 13. As a practical matter, this requirement effectively condemns groundwater rights within a landowner’s contiguous acreage that do not fall within the geometry of a circle. *Id.* Because BVGCD’s Rule 7.1 production limitation is tied to geometry—specifically, a circle of land—those portions of Plaintiff’s and putative class members’ tracts outside the circles of land surrounding proposed new groundwater well sites are effectively condemned by New Rule 7.1(c)(1) (*id.*), as shown in the diagram below:



Assuming a square or rectangular shaped property of sufficient size to support a well under BVGCD's Rules and given that permitted production is tied to a circular shape, the corners of a square or rectangular shaped property are effectively condemned because they are excluded from the total contiguous acreage required by BVGCD's new production-based acreage rule. *Id.* at ¶ 14. This effect is even more pronounced in properties that are not perfect squares or rectangles, which is true of most (if not all) of putative class members' land. *Id.* In fact, BVGCD is not aware of any tracts within the District that are in the shape of a circle. Day Depo. at 194:14-18.

Pre-September 14, 2023, groundwater wells also are not subject to the same spacing or acreage requirements of New Rules 6.1 and 7.1. Thornhill Decl., ¶ 11. Thus, landowners with pre-September 14, 2023 wells drilled on land next to tracts owned by Plaintiff and putative class members—where wells must be drilled under New Rules 6.1 and 7.1 but will not be drilled because they are now not economically feasible—are draining Plaintiff's and putative class members' land with no recourse, further impacting their groundwater property rights. *Id.*

Under BVGCD's New Rules, landowners with pre-September 14, 2023, wells in close proximity to Plaintiff's and putative class members' properties without wells are producing groundwater at rates up to four (4) times the rates allowed to Plaintiff and putative class members. Thornhill Decl., ¶ 11. Because of the fugacious nature of groundwater, Plaintiff's and

putative class members' ability to offset drainage and prevent confiscation of groundwater by their producing neighbors has been reduced or eliminated altogether. *Id.*

Under the New Rules, landowners in the District, such as Plaintiff, seeking to sell their groundwater rights have suffered (and continue to suffer) a 75% decrease in the value of their groundwater production rights while their neighbors with wells drilled under the Old Rules have suffered no diminution in value. Thornhill Decl., ¶ 8. This is a particularly stark impact given that groundwater rights in the Simbsoro Aquifer are currently highly sought after by companies seeking to supply water to municipalities and industries located in other parts of Texas where water is significantly scarcer. *Id.* As a practical matter, these companies can no longer afford to acquire groundwater rights or purchase property with groundwater rights from willing landowners who do not control the required acreage to support the well capacities required to drill economically feasible wells under the New Rules. *Id.*

BVGCD's geometric limitations on production capacity also render it nearly impossible to lease and/or purchase enough property around a wellbore to support a marketable well. Thornhill Decl., ¶ 9, 10. Whether for municipal, industrial, or agricultural use, BVGCD's New Rules preclude the development of Plaintiff's and putative class members' groundwater rights.

The District has the authority to make and pass rules, including rules regarding groundwater well spacing and production limits. TEX. WATER CODE § 36.116. Thus, BVGCD was authorized by statute to pass the changes to Rules 6.1 and 7.1.

The District passed the changes to Rules 6.1 and 7.1 on September 14, 2023 applying the changes only to future groundwater production permits but not to existing permits.

The effect of the September 14, 2023 Rules changes is to require 400% more land to support the same amount of production as compared to landowners with pre-September 14, 2023

groundwater production permits. July 16, 2025, Day Depo. at 89:11-90:2; 91:13-92:1; 215:2-215:6; 267:8-268:11.

Rule 7.1 inherently condemns all of a landowner's property that does not fall within the area of a circle. BVGCD does not even attempt to address this *per se* taking in its Motion. Nor does BVGCD dispute that there are no properties in the district that were conveyed in the shape of a circle. Day Depo. at 194:14-18.

BVGCD should treat everyone fairly and the same with respect to the production of groundwater within the District. Day Depo. at 87:15-18.

If after September 14, 2023 Plaintiff had applied for a groundwater production permit at an allocation amount under the pre-September 14, 2023 Rules, BVGCD would have considered the application to be administratively incomplete and not submitted it to BVGCD's board for consideration and approval; no groundwater production permit would have been issued, without exception. Day Depo. at 52:22-53:22; 149:9-150:15.

#### **SUMMARY JUDGMENT EVIDENCE**

<b>Exhibit</b>	<b>Description</b>
<b>A</b>	July 16, 2025 Rule 30(b)(6) Deposition of Alan Day, BVGCD's General Manager and corporate representative
<b>B</b>	Declaration of Charles Fazzino
<b>C</b>	Declaration of Mike Thornhill
<b>D</b>	Brief of Appellees in <i>Stratta v. Roe</i> , 961 F.3d 340
<b>E</b>	Reply brief in Support of BVGCD's Rule 12(c) Motion for Judgment on the Pleadings in <i>Stratta v. Roe</i> , No. 6:18-CV-00114, in the United States District Court for the Western District of Texas, Waco Division
<b>F</b>	Declaration of Marvin W. Jones

**ARGUMENT AND AUTHORITY**

**I. Ripeness and the Demise of *Williamson County*, BVGCD’s Anchor Case.**

**A. *Williamson County* is no longer good law and not an impediment to this action. This case is ripe for adjudication.**

BVGCD stakes its (lack of) “ripeness” argument on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985), claiming that Plaintiff’s failure to pursue a remedy in state court is fatal to the current case. But BVGCD knows better. BVGCD’s counsel made the same argument in the appeal of a prior case in this Court.<sup>3</sup> While that appeal was pending, the U.S. Supreme Court handed down *Knick v. Twp. of Scott*, 588 U.S. 180 (2019), which put a bright red flag on *Williamson County*. Based on *Knick*, the Fifth Circuit rejected BVGCD’s ripeness argument in that appeal.

The U.S. Supreme Court in *Knick* and the Fifth Circuit in *Stratta* rejected the “state-litigation” ripeness rules. In *Knick*, the Supreme Court referred to BVGCD’s principal authority, *Williamson County*, as “exceptionally ill-founded and conflict[ing] with much of our takings jurisprudence.” *Stratta*, 961 F.3d at 356 (quoting *Knick*, 588 U.S. at 203).<sup>4</sup>

This case is no different. In fact, considering *Knick* and *Stratta*, including BVGCD’s ripeness position there, BVGCD’s position here that this case is not ripe is “virtually frivolous.” *Stratta*, 961 F.3d at 353-54. Because the Fifth Circuit has already rejected the finality argument BVGCD makes here, this Court should do likewise.

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<sup>3</sup> Brief of Appellees in *Stratta v. Roe*, 961 F.3d 340 (5<sup>th</sup> Cir. 2020) at 30 (Exhibit D).

<sup>4</sup> After the Fifth Circuit remanded *Stratta*, BVGCD filed a brief in this Court conceding that plaintiff’s claims there, in fact, were ripe under *Knick*, thus recognizing and relying on the logic of *Knick*. Reply in Support of BVGCD’s Rule 12(c) Motion for Judgment on the Pleadings in *Stratta v. Roe*, No. 6:18-CV-00114 in the United States District Court for the Western District of Texas, Waco Division, at 4 (Exhibit E).

Despite *Knick's* abrogation of *Williamson County*, BVGCD insists that Plaintiff's claims are not ripe because avenues exist for Plaintiff to challenge the District's Rules or take an administrative appeal of the District's decision. This position conflates finality with exhaustion of remedies. To support this proposition, BVGCD cites to *Beach v. City of Galveston*, 2022 U.S. App. LEXIS 9005 (5<sup>th</sup> Cir. 2022) (BVGCD Motion at 15), which itself relies on a line of cases where Section 1983 plaintiffs challenged governmental action while the governmental entities in question still had a plausible chance to reverse course.

In *Beach*, a property owner seeking to keep a multifamily dwelling "grandfathered" under the City's zoning laws (1) failed to complete the steps required to comply with the City's code; (2) failed to appeal the City's determination that the property lost its grandfathered status; and (3) failed to re-submit an application for Specific Use Permit after being encouraged by the City to re-apply. *Id.* at \*2-4. The Fifth Circuit determined that on the factual record, the plaintiff failed to show that the City's decision was final. This was so because "avenues still remain[ed] open for the government to clarify or change its decision." *Id.* (citing *Pakdel v. City & County of San Francisco*, 594 U.S. 474, 478 (2021)). The factual record here is significantly different because there is no doubt how New Rules 6.1 and 7.1 will be applied to groundwater well permit applicants after September 14, 2023. *See Pakdel*, 594 U.S. at 478 ("The finality requirement is relatively modest...[a]ll a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question.") [internal quotations omitted].

BVGCD essentially argues that Plaintiff's claims are not ripe because it could bring a Rules challenge or suit under TEX. WATER CODE § 36.251. BVGCD Motion at 15. In effect, the District seeks to resurrect the exhaustion of remedies requirement from the ashes of *Williamson County*. Finality is all that is required, not the exhaustion of remedies. *Knick*, 588 U.S. 180, 185

(2019) (“[T]he settled rule is that ‘exhaustion of state remedies’ is *not* a prerequisite to an action under [42 U.S.C.] § 1983.”).

The finality requirement is a modest one, and Plaintiff can conclusively prove that there is “no question about how the regulations at issue apply to the particular land in question.” *Pakdel*, 594 U.S. 373, 478 (2021). Per Mr. Day, if after September 14, 2023 Plaintiff had applied for a groundwater production permit at an allocation amount under the pre-September 14, 2023 Rules, BVGCD would have considered the application to be administratively incomplete and not submitted it to BVGCD’s board for consideration and approval; no groundwater production permit would have been issued, without exception. Day Depo. at 52:22-53:22; 149:9-150:15.

**B. By making the September 14, 2023 Rules changes, BVGCD created the necessary finality for Plaintiff to bring its claim. Plaintiff’s challenge to the Rules changes is a facial challenge.**

By making the September 14, 2023 Rules changes, BVGCD created the finality for Plaintiff to bring its claim. Plaintiff’s claim is a facial challenge to the effect of the Rules changes. Because BVGCD applied its “New Rules” prospectively only, leaving in effect a disparate set of rules for prior groundwater production permits, there is no set of facts under which the Rules changes can be considered valid without the payment of just compensation for the taking those changes inflict.

After the Rules changes, all landowners across the District are not treated fairly and the same, which is the law in Texas and what should happen.<sup>5</sup> Even Mr. Day agrees. Day Depo. at

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<sup>5</sup> BVGCD jumps at references to “fairness” and “equality” to claim Plaintiff is asserting some unpleaded equal protection claim, and thus the claims “must be” part of an (also unpleaded) complaint under TEX. WATER CODE § 36.101. BVGCD Motion at 6-7. It is unclear what BVGCD hopes to achieve by setting up strawmen in the form of unpleaded claims since it is undisputed that the court cannot adjudicate such claims Even BVGCD agrees. *See* BVGCD Motion at 9 n. 5.

87:15-18. As such, it was not necessary for Plaintiff to engage in an exercise in futility by applying for a groundwater production permit at an allocation amount under the pre-September 14, 2023 Rules, which BVGCD would have considered administratively incomplete and not submitted to its board for consideration and approval (Day Depo. at 52:22-53:22; 149:9-150:15) and then appeal the denial of the application through a state-centric process—which would likely be the case in an “as-applied” challenge. Plaintiff’s challenge, however, is a “facial challenge.”

It is undisputed that the District granted numerous groundwater production permits before September 14, 2023 that allowed the holders to produce an amount of groundwater based on both Rule 6.1 as it existed at that time *and* Rule 7.1 as it employed the spacing dictated by Rule 6.1. These pre-September 14, 2023 permits still exist and are scattered randomly over homogeneous aquifers in the District, including the Simsboro Aquifer. It is further undisputed that anyone—and that means everyone—who applies for a post-September 14, 2023 groundwater production permit must have 400% more land to support the same amount of production from the same homogenous aquifer as produced under a pre-September 14, 2023 permit. Per Mr. Day, there are no exceptions. Day Depo. at 53:7-22; 77:1-78:6; 150:3-15.

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Plaintiff did not plead an Equal Protection cause of action because BVGCD did not create discrete and objectively identifiable classes of permit applicants and has not irrationally singled out Fazzino. *See, e.g., Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008) (discussing types of equal protection claims). Rather, severely curtailing groundwater production rights for applicants after a specific date is more akin to forcing some people to “alone bear public burdens which, in all fairness and justice, must be borne by the public as a whole.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That is the paradigmatic test for a taking.

Disparate treatment of permit applicants based on when the application was filed may not sound in equal protection, but that does not prevent that conduct from constituting a taking. *See Fazzino v. Roe*, No. 6:18-CV-00114-JCM, 2021 WL 8202575 (W.D. Tex. Aug. 23, 2021) (denying BVGCD’s summary judgment motion on plaintiff’s regulatory takings claims) *cf. Fazzino v. Roe*, 6:18-CV-00114-JCM, 2021 WL 8202798 (W.D. Tex., Aug. 23, 2021) (granting BVGCD’s summary judgment motion on plaintiff’s equal protection claim).

The result of this disparate set of rules is clear: the amount of groundwater that Farmer A can produce from his or her 100 acres *after* September 14, 2023 has been trimmed by 75%<sup>6</sup>—every time for every permit application, no exception. Day Depo. at 53:7-22; 77:1-78:6; 150:3-15. This practice falls squarely under the constitutional prohibitions in *Marrs v. Railroad Commission*, 177 S.W.2d 941 (Tex. 1944), *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), and *Stratta*.

In *Marrs*, the Texas Supreme Court plainly stated “[t]his Court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field.” 177 S.W.2d at 949. In *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73 (Tex. 1939), that same Court said:

It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be “confiscation” within the meaning of Rule 37 and the Rule of May 29th.

*Id.* at 80. Similarly, the Texas Supreme Court noted in *Halbouty v. Railroad Commission*, 357 S.W.2d 364 (Tex. 1962):

It is an obvious result that if in a common reservoir one tract owner is allowed to produce many times more gas than underlies his tract he is denying to some other landowner in the reservoir a fair chance to produce the gas underlying his land.

*Id.* at 374. While *Marrs*, *Gulf Land*, and *Halbouty* concern oil and gas issues, the Texas Supreme Court has explicitly held that oil and gas law is applicable to groundwater law because they are “not merely similar; they are drawn from each other or from the same source.” *See Coyote Lake*

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<sup>6</sup> BVGCD disputes this number, but admits that even under its own calculations, the amount that Farmer A can produce from the same 100 acres would be reduced by 50%. Day Depo. at 90:9-91:12. Yet as noted elsewhere, BVGCD admits that it takes four times as much land to produce the same amount of water *after* September 14, 2023 than would have been required *before* September 14, 2023. Whether the number is 50% or 75%, landowners across the District clearly are not treated fairly and the same in violation of Texas law and BVGCD’s own operational principles. Day Depo. at 87:15-18.

*Ranch v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016). This common parentage led the court in *Day* to analogize the correlative rights as between landowners in a common subsurface reservoir, whether of minerals or water, as being recognized both at common law and more particularly through state regulation that “affords each landowner ‘the opportunity to produce his fair share of the groundwater beneath their property.’” *Coyote Lake* at 64 (quoting *Stratta*, 961 F.3d at 361-62).

Creating rules that treat different people in the same oil field or aquifer differently will always be unconstitutional. Plaintiff’s challenge here, therefore, is a facial challenge to the Rules because BVGCD’s Rules changes cause an unconstitutional result without exception. The unconstitutional result is not dependent on any analysis of individual persons or situations. Every person who applies to produce groundwater in an aquifer within the District under the New Rules will be treated differently than similar groundwater producers under the Old Rules and will be deprived of the fair opportunity to produce their fair share of the groundwater. No set of circumstances will alter this result. Even BVGCD agrees; there are no exceptions. *Day Depo.* at 53:7-22; 77:1-78:6; 150:3-15. Thus, there is no set of circumstances under which the effects of the Rules changes can be a valid exercise of the District’s power.

Plaintiff does not seek damages, which might be appropriate in an “as-applied” challenge to the District’s actions. Plaintiff seeks relief in the form of a declaration that the changes to Rules 6.1 and 7.1 result in an unlawful two-tiered scheme that deprives it and others of their fair opportunity to produce a fair share of the groundwater underlying their properties. This is not an equal protection argument, the disparate treatment of landowners in a common subsurface reservoir is literally “the taking of one man’s property and the giving it to another.” *Marrs*, 177

S.W.2d at 948. Plaintiff seeks a judgment that BVGCD cannot enforce the Rules as changed. That claim is ripe for adjudication.

**C. Plaintiff is not required to engage in an exercise in futility to bring its claims.**

The functional finality of the Rules changes and resulting ripeness is confirmed by the testimony of Mr. Day, BVGCD's General Manager, speaking as BVGCD's corporate representative. Asked what he would do if the Plaintiff had presented him with a groundwater production permit application in July 2025 with a production limit based on the Old Rules, Mr. Day emphatically testified that he would have declared the application administratively incomplete as not complying with the current or New Rules. Day Depo. at 52:22-53:22; 149:9-150:15. Once he declared it to be administratively incomplete, the application would not be submitted to the BVGCD board for consideration and approval. No decision would ever have been made on the application, and there would be no possibility for the board to "change its mind" on a matter that would never be brought before it. *Id.*

Mr. Day's testimony confirms that any such groundwater permit application would have been trapped in a "Catch 22" of administrative purgatory: Plaintiff couldn't appeal because there would not have been a final board action because his application would not have been administratively complete since he would have asked for treatment under the pre-September 14, 2023 Rules. Thus, there can be no "as applied" challenge to the Rules changes here because Plaintiff would have been "boxed out" of the process that BVGCD claims is a *sine qua non* for bringing suit. But after *Knick*, there is no requirement for a takings plaintiff to engage in such a Sisyphean task.

**II. Takings Jurisprudence is not a Game of Semantics.**

**A. "Unlawful," "Illegal," and "Ultra Vires" are not takings-terminating words.**

BVGCD again mistakenly high centers on the word “unlawful” as used in Plaintiff’s Complaint, asserting that Plaintiff has no claim because BVGCD’s actions, if unlawful, could not support a taking claim. BVGCD Motion at 8, 10-13. Not true. Unlawful acts are not *per se* unauthorized for purposes of engaging in a Fifth Amendment taking analysis. *Vanda Pharm., Inc. v. United States*, 169 Fed. Cl. 196, 205 (2024).<sup>7</sup>

First, and as noted in Plaintiff’s class certification reply brief, BVGCD fails to correctly interpret the word “unlawful.” Of course, if BVGCD would stipulate that its Rule changes, in fact, were unlawful, Plaintiff’s request for declaratory judgment that the Rules changes be abrogated would come into focus. But BVGCD’s focus is in the wrong place. Plaintiff does not assert that BVGCD did not have lawful authority to pass New Rules 6.1 and 7.1, nor does Plaintiff assert that the September 14, 2023 Rules changes were somehow outside the authority granted to BVGCD by the Texas Water Code.

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<sup>7</sup> BVGCD’s hope of terminating this takings case because of an unpleaded suggestion that the Rules changes are *ultra vires* is misplaced. The District hangs its hat on *Lafaye v. City of New Orleans*, 35 F.4th 940 (2022). In *Lafaye*, the City of New Orleans failed to pay a state court judgment, which the plaintiffs alleged constituted an uncompensated taking. The Fifth Circuit determined that kind of “lawless government” action was not a taking but nevertheless held that plaintiffs were otherwise entitled to damages.

Here, on the other hand, there is no allegation that BVGCD’s Rules were passed without authority. In holding that *ultra vires* conduct cannot give rise to a Fifth Amendment taking, the courts have drawn an important distinction between conduct that is “unauthorized” and conduct that is authorized but nonetheless unlawful. *See, e.g., Del-Rio Drilling Programs v. United States*, 146 F.3d 1358, 1362 (Fed. Cl. 1998). Merely because the government’s conduct is unlawful does not mean that it is “unauthorized;” a government official may act within his authority even if his conduct is later determined to be contrary to law. If the government has taken property in a legally improper manner, it has committed two violations of the property-owner’s rights. The two separate wrongs give rise to two separate causes of action, and the property-owner may elect to sue for just compensation or seek relief for the legal improprieties committed during the taking. *Id.* (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319-22 (1987)).

To be clear, BVGCD has the authority to regulate groundwater well spacing and production within the District. TEX. WATER CODE § 36.116. In doing so, BVGCD is authorized to pass or change rules. But BVGCD must regulate groundwater well spacing and production within the District consistent with Texas law, this includes acknowledging that groundwater is owned in place and subject to constitutional takings. BVGCD is not its own private fiefdom.

What makes BVGCD's September 14, 2023 Rules changes "unlawful" (or wrongful or unfair or unjust) is the fact that by changing Rules 6.1 and 7.1 prospectively only, BVGCD created a two-tiered regulatory scheme under which "Old Rules" groundwater production permit holders are allowed to produce up to four (4) times as much groundwater per acre as compared to "New Rules" permit holders. BVGCD does not try to justify this vast difference in regulated rights by citing to a logical rationale, such as "best available science" or demonstrated hydrogeological characteristics of the aquifer. This is wrongful because it deprives "New Rules" landowners of their fair opportunity to produce a fair share of the groundwater—which is the teaching of *Day*, 369 S.W.3d at 830, and *Marrs*, 177 S.W.2d at 948. Importantly, it is the clear holding of the Fifth Circuit in *Stratta*, 961 F.3d at 359, pertaining specifically to BVGCD.

BVGCD does not pretend that its Rules allow each landowner a fair opportunity to produce his or her fair share of groundwater. Mr. Day, its General Manager and corporate representative, expressed an unusual view of the obligations of the District to apply its Rules uniformly, admitting that the bifurcated application of the BVGCD Rules results in two "buckets" of permit holders: those who hold pre-September 14, 2023 permits and those who may apply for and receive post-September 14, 2023 permits. Day Depo. at 267:8-268:15. Mr. Day further testified that the two "buckets" are not the same even though the aquifer is the same. *Id.* BVGCD's Motion reflects the same skewed view of regulatory uniformity:

There's a good reason that Plaintiff hasn't pleaded an Equal Protection claim complaining about rules that have always applied equally to everyone in the District at any given point in time: it would lose on that claim.

*Id.* at 9 n.5 (citing a trial court order in *Fazzino v. Roe*) (emphasis added). This argument doubles down on BVGCD's head scratching sworn deposition testimony that it has complied with the duty to apply its Rules uniformly treating everyone in the first bucket the same and treating everyone in the second bucket the same while, at the same time, confirming that as between the two buckets, District landowners are treated differently. Day Depo. at 267:8-268:15. This is the violation of *Day*, *Marrs*, and *Stratta* giving rise to Plaintiff's claims.

BVGCD cites *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) to support its position that references to a regulation's illegality terminates a plaintiff's takings claim. BVGCD Motion at 12. But that's not the holding in *Lingle*. There, the United States Supreme Court abrogated the "substantially advances" regulatory takings test first introduced in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). *Lingle*, 544 U.S. at 532. In *Agins*, the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance a legitimate state interest..." *Id.*, 447 U.S. at 260. The Supreme Court observed that the "substantially advances" regulatory takings test has "some logic in the context of a due process challenge" because "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle*, 544 U.S. at 542. But regulatory takings tests seek to determine if a regulatory action is "functionally equivalent" to an appropriation of private property for a public purpose. *Id.* at 539-40. The Court determined that "[i]nstead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulations underlying validity." *Id.* at 543.

Thus, *Lingle* stands for the proposition that a regulation's underlying validity is *irrelevant* to, rather than preclusive of, a regulatory taking claim. *See id.* at 546. *Lingle* does not apply here.

**B. Desired Future Conditions and the disparate curtailments.**

BVGCD's rationale for its two-tiered regulatory scheme is that it changed its groundwater production limitations to avoid exceeding its "desired future condition (DFC)." Day Depo. at 268:13-269:9. A word about DFCs. Section 36.101(30) of the Texas Water Code defines the term "desired future condition" as "a quantitative description, adopted in accordance with Section 36.108, of the desired condition of the groundwater resources in a management area at one or more specified future times." As such, DFCs are typically expressed in terms of the way the groundwater conservation districts want their aquifers to "look" at a set time in the future. For example, a groundwater conservation district might say (as does BVGCD) that it wants the artesian head pressure in the Simsboro aquifer to be reduced by no more than 262 feet by 2070. Day Depo. at 112:25-113:3. A DFC is determined for each aquifer in the District and applied as an average across the District; DFCs are not applied to individual properties or wells. Day Depo. at 40:19-41:1.

Nevertheless, and in part because BVGCD was receiving "an avalanche" of applications for groundwater production permits in the early 2020s, it began looking at the impact on the DFCs of each well application submitted. Day Depo. at 69:9-72:8. At a March 22, 2023 BVGCD board meeting, a board member asked Mr. Day to contact other Texas groundwater conservation districts to survey the methods they used to slow down the number of groundwater production permits. Day Depo. at 201:24-203:23. In other words, the BVGCD board of directors wanted to figure out a way "how we go about making it a larger area to be able to obtain a permit." Day Depo. at 204:15-205:7. Mr. Day further testified that the BVGCD board of directors chose to

manage the aquifers to make sure not to exceed the DFCs “and to do their very best not to get to a curtailment,<sup>8</sup> which affects everyone’s property.” Day Depo. at 268:13-269:9.

BVGCD could have met this goal by curtailing groundwater production from all permits across the District, thereby avoiding the situation found to be unconstitutional in *Marrs*. But BVGCD instead chose to allow existing permit holders to continue producing groundwater at a higher rate while putting all the burden of its new conservation concerns on a subset of landowners who were not yet producing groundwater. So, rather than avoiding a curtailment “affecting everyone’s property,” the District passed the New Rules, which resulted in a *de facto* curtailment of groundwater production for the landowners that did not yet have permits. Said differently, BVGCD decided it could not meet its DFCs if additional groundwater production permits were issued at the production rate allowed by the Old Rules, so it placed the burden of meeting its DFC goals on landowners who did not then have a permit, violating the Fifth Amendment in the process. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

That said, if BVGCD is truly concerned about meeting its DFCs, it should spread the burden of curtailment across all permitted groundwater production, past and future. Putting the burden on a subset of landowners defined only by the date their permits were issued is a taking of their property without just compensation.

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<sup>8</sup> Used in this context, “curtailment” means cutting back the allowed groundwater production of all wells in an aquifer across the District.

In sum, BVGCD’s actions in passing its Rules or changing its Rules are “authorized” but the result—its two-tiered regulatory scheme—is “unlawful” or “illegal” or “wrongful” or “actionable” because such actions deprive Plaintiff and the putative landowner class members of the opportunity to produce their fair share of the groundwater beneath their land. BVGCD’s feigned confusion over Plaintiff’s allegations fails to distinguish or correctly interpret the nature of its wrongful acts or the actual remedy sought.

Plaintiff’s taking claim is valid, ripe, and actionable.

**WHEREFORE**, Plaintiff respectfully requests that the Court (i) deny Defendant’s Rule 12(c) Motion for Judgment on the Pleadings and/or Rule 56 Motion for Summary Judgment, and (ii) grant Plaintiff and the putative class such other and further relief to which they are entitled.

Date: November 20, 2025.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2025, I served a true and correct copy of Plaintiff's Response in Opposition to Defendant's Rule 12(c) Motion for Judgment on the Pleadings and/or Rule 56 Motion for Summary Judgment on Defendant's counsel via email and the Court's electronic filing system.

/s/ Marvin W. Jones

Marvin W. Jones