

**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 POST-CERTICATION HEARING SUPPLEMENTAL BRIEF**

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**TO THE HONORABLE UNITED STATES MAGISTRATE JUDGE:**

Plaintiff Fazzino Investments, LP (“Plaintiff”), for itself and all others similarly situated, respectfully submits this post-certification hearing supplemental brief.

**UNDISPUTED AND INDISPUTABLE KEY FACTS**

1. On September 14, 2023, BVGCD (or the “District”) changed Rules 6.1 and 7.1 (together, the “New Rules”) governing groundwater well spacing.
2. The New Rules apply to all groundwater wells in the District permitted on or after September 14, 2023. The Old Rules continue to apply to all groundwater wells in the District permitted before September 14, 2023—thereby creating a two-tiered regulatory scheme.

**ARGUMENT AND AUTHORITY**

**I. BVGCD’s two-tiered regulatory system is a taking.**

BVGCD committed a taking when it changed Rules 6.1 and 7.1 and applied the New Rules to some, but not all, District groundwater owners. Unlike in typical land use ordinance cases relied upon by BVGCD, the property taken here is not static: Simsboro Aquifer groundwater is fugacious and moves underground toward wells that are pumping. *See Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53, 63 (Tex. 2016); Thornhill Decl. (Exhibit B), ¶¶ 11-12. Thus, the taking by BVGCD’s New Rules must be analyzed in light of the fact that Plaintiff and the class member landowners own the absolute right to a fair opportunity to produce their fair share of the common fugacious resource. *Stratta*, 961 F.3d 340 at 357, 359, 360; *Marrs v. R.R. Comm’n*, 177 S.W.2d 941, 948 (Tex. 1944); *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 296, 305 (Tex. 1935); Tex. Water Code §36.002 (the right to produce is a property right).

This absolute right to a fair opportunity to produce one’s fair share of groundwater under their land is not merely a “stick” in the bundle of rights; it is the bundle. *See, e.g., R.R. Comm’n*

*v. DeBardeleben*, 305 S.W.2d 141, 143 (Tex. 1957) (“Confiscation...means the denial to an owner or lessee of a fair chance to recover the oil or gas in or under his land or the equivalent in kind.”). If an oil and gas lessee were precluded by regulation from developing its mineral estate, whether a taking occurred would not hinge on what impact the regulation had on the value of the surface estate. Likewise, here, restricting the groundwater production rights of some, but not all, the Simsboro Aquifer landowners in the District is a taking. The impact of BVGCD’s Rules changes on the value of such landowners’ surface estates is irrelevant.

The “bundle of sticks” taken by BVGCD is composed of two elements: the groundwater owners’ right to produce their fair share of groundwater *and* the landowners’ right to protect their groundwater by offsetting drainage (aka “confiscation”).<sup>1</sup> *See, e.g., Marris*, 177 S.W.2d at 948 (“Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.”). Thus, denying groundwater owners within the District their opportunity to produce a fair share of groundwater is a “confiscation” (taking) of the groundwater owners’ property.

Both parties cite *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021). But only Plaintiff cites it for the right reason. There, Cedar Point’s claims were initially dismissed for lack of a *Penn Central* taking. The Supreme Court disagreed, noting that the government took the important right to exclude. Likewise, the right to offset drainage of a fugacious substance (groundwater) across the Simsboro Aquifer is a property right.

BVGCD contends, based on a fragment of the *Day* opinion as abstracted from an opinion

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<sup>1</sup> In oil and gas cases, “confiscation” means drainage. *R.R. Comm’n v. Gulf Production Co.*, 132 S.W.2d 254, 255 (Tex. 1939). While *Marris*, *DeBardeleben*, *Brown*, *etc.* concern oil and gas issues, the Texas Supreme Court has explicitly held that oil and gas law is also applicable to groundwater because they are “not merely similar; they are drawn from each other or from the same source.” *See Coyote Lake Ranch*, 498 S.W.3d at 64.

by the Northern District of Texas, that “ordinary drainage” does not amount to a taking. The Court in *Day* said that “...a landowner has a right to exclude others from groundwater beneath his property, but one that cannot be used to prevent ordinary drainage.” The term “ordinary drainage” appears seldomly in the case law, but this Court’s opinion in *Fazzino v. Roe* is one of those cases. There, this Court denied BVGCD’s motion for summary judgment on plaintiff’s taking theory because a fact issue existed as to whether disparate production allocations between neighboring landowners appropriated Fazzino’s right to exclude. *Fazzino v. Roe*, No. 6:18-CV-00114-JCM, 2021 U.S. Dist. LEXIS 258123, at \* 9 (W.D. Tex. October 18, 2021).

Due to the New Rules, the proposed class have lost their right to exclude others from taking their groundwater by offsetting production. *Marrs* nails down why BVGCD’s two-tiered regulatory system is a taking:

As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves, they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.

*Id.*, 177 S.W.2d at 948.

BVGCD admits that the New Rules were driven by its concern that it could not meet its desired future condition (DFC) for the Simsboro Aquifer. *Day Depo.* (Exhibit J) at 69:9-72:8; 201:24-203:23; 268:13-269:9. By implementing the two-tier system BVGCD put the burden of meeting its DFC on landowners who did not then have a permit. But the burden to meet BVGCD’s groundwater conservation goals is a burden that “should be borne by the [District landowners] as a whole,”<sup>2</sup> rather than forced on a subset of owners with rights in the same

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<sup>2</sup> See *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

aquifer. BVGCD took Plaintiff's and class members' fair opportunity to produce a fair share of their groundwater. BVGCD also took their right to offset production by others confiscating their groundwater. There can be no question here that BGGCD's Rule changes constitute a taking.

Finally, BVGCD does not contest, much less address, the fact that its "circle" formula condemns all property that does not fit within a circle. *See* Plaintiff's Class Certification Motion (ECF #31) at 5-6; Thornhill Decl. (Exhibit B) ¶¶ 13-14. Nor is there any property in the District in the shape of a circle. Day Depo. at 194:14-18. This "circle condemnation" also is a *per se* taking affecting the entire class.

## **II. *Penn Central* does not apply and should be disregarded.**

BVGCD's heavy reliance on *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) is misplaced. The taking here is *per se* and "thus *Penn Central* has no place." *Cedar Point Nursery*, 594 U.S. at 149. BVGCD treats the *Penn Central* factors as though they are elements of a cause of action. Not so. They are merely points to consider in the "ad hoc" factual inquiry to be made in each case. *Penn Central*, 438 U.S. at 124.

But even more critically, BVGCD conveniently overlooks the third *Penn Central* factor: the nature of the government action. Per *Blackburn v. Dare Cnty.*, 58 F.4<sup>th</sup> 807 (4<sup>th</sup> Cir. 2023):

Another principle we can distill from the caselaw is that we should consider the distributional impact of the order. All else being equal, a regulation is more problematic when it burdens only a small number of property owners.

*Id.* at 814. This is precisely the case here. This BVGCD-neglected factor ties straight back to the actual purpose of the Fifth Amendment: barring the government from forcing a subset of people to bear a burden that, in all fairness and justice, should be borne by the public as a whole. Here, BVGCD's New Rules force a subset of groundwater owners to sacrifice their production to meet

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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.").

BVGCD's Simsboro Aquifer DFC, a burden that should fall on all District groundwater owners. So, if *Penn Central* must be considered—which it shouldn't—this factor confirms the taking.

### **TAKING CLASS ACTIONS**

The Court inquired about the existence of other takings cases brought as class actions with particular concern for cases seeking certification under Rule 23(b)(2). Plaintiffs identify the following cases where courts found class certification of takings claims proper:

- *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018) (district court erred in dismissing per se taking on *Williamson County* ripeness ground, claims could be certified for class treatment under Rule 23(b)(2)).
- *Garcia-Rubiera v. Calderon*, 570 F.3d 443 (1st Cir. 2009) (reversing district court's dismissal of plaintiffs' regulatory takings claim and denial of class certification under Rule 23(b)(2)).
- *Vargo v. Barca*, 20-cv-1109-jdp, 2023 WL 6065599 (W.D. Wis., September 18, 2023) (23(b)(2) class certified on regulatory taking claim challenging Revised Uniform Unclaimed Property Act).
- *Riemer v. State*, 392 S.W.3d 635 (Tex. 2013) (district court and court of appeals erred in denying class certification to group of property owners alleging takings claim arising from the State's approval of a 1981 survey establishing the Canadian River boundaries).

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Certifying this action as a class action will ensure that the Court's merits ruling is applied fairly, evenly, and consistently by BVGCD across the District and forestall any efforts by BVGCD to distinguish Plaintiff's situation from those of other similarly situated District landowners. Accordingly, Plaintiff respectfully requests the Court to (i) certify this action as a class action under FED. R. CIV. P. 23(b)(2), (ii) appoint Plaintiff as the class representative, and (iii) appoint Plaintiff's counsel as Co-Lead Class Counsel.

Date: December 19, 2025.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 19, 2025, I served a true and correct copy of Plaintiff's Post-Certification Hearing Supplemental Brief on Defendant's counsel via email and the Court's electronic filing system.

/s/ Marvin W. Jones

Marvin W. Jones