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'S SUPPLEMENTAL BRIEF

"Plaintiff and putative class members have suffered both a *per se* taking and a regulatory taking . . ." (Pl.'s Mtn. (Doc. 31) at 9.)

Plaintiff alleges a regulatory taking because the District's Amended Rules allegedly reduce the amount of water a landowner may be permitted to pump—based on acreage and configuration—thereby decreasing economic value and frustrating investment-backed expectations. (Doc. 1 ¶¶ 20, 38.) Plaintiff likewise asserts a per se taking based on alleged drainage from nearby wells permitted under the prior rules. (Doc. 1 ¶ 18.) Both theories require a property-by-property inquiry to determine ***whether any actionable taking has occurred***.

- **Regulatory Taking**: Your honor asked the right question: "don't all new regulations make things more restricted than they were?" Yes, they generally do, and the effects of same do not establish a taking just because they impact a property right. Yet, Plaintiff inexplicably argued at hearing that it pleads a regulatory taking, but "not

a *Penn Central* taking."[1] *All* regulatory takings are *Penn Central* takings. "Our regulatory takings jurisprudence" is one of "'essentially **ad hoc, factual inquiries**,' *Penn Central*, 438 U.S. at 124, 'designed to allow careful examination and weighing of **all the relevant circumstances**.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (cleaned up). The idea that a party "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Cent.*, 438 U.S. at 130.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 124 (cleaned up). For example, a city might amend its development ordinances to increase the required building setback from the street from 20 feet to 30 feet (thus rendering an additional 10 feet of land "unbuildable.") A court of course would need to perform a *Penn Central* analysis of every impacted property to determine whether such reduction caused a taking as to that property. Plaintiff's logical syllogism, on the other hand, is functionally "any time a regulation is changed to have a greater impact/restriction on any property interest, all impacted persons have a class-action taking claim." That approach would sidestep and void regulatory takings jurisprudence,

[1] The Complaint speaks for itself. It complains of the regulatory impact, expressly invoking two primary *Penn Central* factors: the alleged reduction in allowable groundwater production per the Amended Rules (1) purportedly "*decreased the economic value of their water rights*" and (2) "*thwarts their investment-backed expectations*." Doc. 1 ¶¶ 20, 38; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (listing a regulation's economic impact and interference with investment-backed expectations as the first two factors of a regulatory-takings analysis).

would make plaintiffs of people who do not even have a valid claim (and thus no standing), and would make all existing groundwater rules essentially "un-amendable."

Plaintiff also complains as to the impact on just a landowner's appurtenant groundwater rights (a single "stick" in the bundle of rights); that's also not the law: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated;" instead it looks to "the interference with rights *in the parcel as a whole*." *Id.* at 130–31.[2] **To determine whether a regulatory taking has happened**, the required questions are (1) what was the value of each parcel-as-a-whole before vs. after[3], and (2) what were the investment-backed expectations of each putative class member?

- **Physical Invasion/*Per Se* Taking**: The sole pleaded violation of Plaintiff's "right to exclude" is that third parties are "draining" class members' groundwater and the class members do not have a right to "offset" such drainage.[4] The rule as

---

[2] Similar to this case, the plaintiff in *Penn Central* complained about the impact of a regulation on one "stick" in its bundle of rights: its "air rights" to develop property above its current structure in New York. *Id.* But the Supreme Court did not consider the impact on that single "stick" in isolation; it instead analyzed the "parcel as a whole," which was the entire "city tax block designated as the 'landmark site.'" *Id.*

[3] In a similar challenge to groundwater pumping rules, analyzing the requisite regulatory factor of the economic impact of that district's rules required "'compar[ing] the value that has been taken from the property with the value that remains in the property." Memorandum Opinion and Order at 14, *BLF Land, LLC v. North Plains Groundwater Conservation Dist.*, 2024 U.S. Dist. Lexis 205913 (Nov. 13, 2024) (cleaned up) (*see also* copy of opinion previously filed at Doc. 39-3). The court further observed that "[n]o authority, to this Court's knowledge, has ever found economic impact that could warrant a taking where the property's value fell less than 42.5%." *Id.* (cleaned up). The threshold of "economic impact" is quite high. Here, it would need to be cleared by every one of the putative 2,100 "plaintiffs."

[4] The claim is much the same as the one rejected in *BLF Land*, where plaintiff complained that the District's rules "prevent[ed] them from pumping the full amount

> to drainage of groundwater (and whether it might rise to a taking) is set by *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 830 (Tex. 2012), which requires that a plaintiff must show more than "ordinary drainage." That is necessarily a property-specific inquiry, and just as in *BLF Land*, "here we know nothing about the relative disparity between Plaintiff's land and their neighbors'" (or any of the other 2,099 other purported class members; there's no way of knowing without individual inquiry). *BLF Land* at 12. The *BLF Land* claim failed because "Plaintiffs have not demonstrated that drainage—beyond what is normal—has occurred or will occur." *BLF Land* at 11 (emphasis added). ***That is the test to determine whether a "physical invasion" claim can be stated at all, and it must be applied to all properties at issue.***[5]

Plaintiff's claim really is one of "unfairness:" applicants under the old rules received more generous permits than those applying after the rules changed. Plaintiff cites no case holding that such timing-based differences are actionable as a takings claim, and this Court has rejected that theory (albeit in an "equal protection" context, the only possible home for such approach). In the prior *Fazzino* case, the plaintiff likewise challenged rules allowing preexisting wells to pump more than wells permitted after the Rules were promulgated, but this Court held that time-based distinctions—

---

of their groundwater rights" and "deprive[d] them of the right to exclude others from their groundwater by 'preventing [them] from offsetting drainage.'" *BLF Land* at 8.

[5] The Court should note that while Plaintiff used the term in oral argument, Plaintiff does not actually plead that the District has "physically appropriated" its groundwater, nor could it per the facts alleged, as it complains only of the economic harm allegedly caused by reduced access due to the Amended Rules, and alleged drainage by third parties (which is a fact-specific inquiry as discussed above).

rules applying equally to all before a date and equally to all after—do not constitute unfair or dissimilar treatment. Order at 1–2, 5, *Fazzino v. Roe, et al.,* No. 6:18-CV-00114-JCM (Aug. 23, 2021) (*see also* copy of order previously filed at Doc. 39-4.)

Plaintiff further asks this Court to do what no Texas court has done—extend the 80-year-old oil-and-gas decision in *Marrs v. R.R. Comm'n*, 177 S.W.2d 941 (Tex. 1944), to groundwater without distinction. The same argument, by the same legal team, was rejected in *BLF Land*, where the court held *Marrs* "is also inapposite." *BLF Land* at 11. Groundwater rights are instead governed by *Day*, which held that a landowner's right to groundwater "cannot be used to prevent ordinary drainage." 396 S.W.3d at 830. As in *BLF Land*, this Court should decline the invitation to ignore *Day* in favor of *Marrs*.

- **The Necessary Property-Specific Inquiries Preclude Class-Certification**:

Predominance and commonality require more than a shared legal backdrop; they require a common injury capable of a common answer. Here, Plaintiff pleads generalized *impact*, not a common *injury*. Whether any particular property has suffered a compensable taking turns on individualized facts—including the nature and extent of any interference, causation, and the degree of alleged harm—making a class-wide determination impossible. (*See* Doc. 39 at 22–23.) Certifying the requested class would put the Court in the position of granting relief—if plaintiff prevails—to parties who do not have an actionable taking claim, in violation of Article III.

Where, as here, a court must conduct a property-by-property inquiry to determine whether a taking has occurred at all, commonality and typicality necessarily fail. Some putative class members may have viable claims, while others may have none, and claims

requiring a threshold, individualized determination of whether a claim exists are not suited for class treatment.[6] Whether any putative plaintiff has a claim here is a matter of degree, not a binary test, and the claims thus cannot be resolved with a common answer. Plaintiff's Motion should be denied.

[6] The Court requested Plaintiff provide relevant examples of certified class action takings cases. Defendant searched as well, and reasonable efforts did not yield any on-point examples. We did find an example that is both distinguishable and presents a cautionary tale: *Bywaters v. United States*, 196 F.R.D. 458 (E.D. Tex. 2000). That case presenting a taking claim arising from a federal statute that prohibited certain unused easements from being considered abandoned. That is, it presented a binary physical invasion question quite different than the claim here: either the property owners could exclude the easement holder, or they couldn't. And even that said, it turns out that the class included multiple pieces of property that shouldn't have been included in the original class—an issue that had to be cleaned up at the settlement stage. *Bywaters v. USA*, Case 6:99-cv-00451, Stipulation and Settlement Agreement, ¶¶ 5–8 (E.D. Tex. July 31, 2009) (noting that as to 99 deeds, the claims were to be dismissed with prejudice). The present case presents no such original, binary question, and the Court should avoid having to undertake an improper and untimely *post hoc* analysis of each property (how would discovery as to the before-and-after value or hydrological impact on 2,100 properties belonging to third parties even be conducted?) to see if they *really* belong in the case.

Respectfully submitted,

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

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

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 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:

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

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

ATTORNEYS FOR PLAINTIFFS

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