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 OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION TO DENY MOTION TO CERTIFY CLASS (DKT. NO. 63)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiff Fazzino Investments, LP ("Plaintiff"), for itself and all others similarly situated, objects to the Magistrate's Report and Recommendation to Deny Motion to Certify Class ("R&R") (Dkt. No. 63), and respectively shows the following:

INTRODUCTION

This case is a public interest taking class action against a governmental agency to uphold constitutional principles and protect Plaintiff's and the putative class member landowners' *groundwater property rights.*[1] Plaintiff, for itself and the putative class, seeks injunctive and

[1] Public interest litigation is a distinct area within the legal system, differing significantly from traditional lawsuits. *See, e.g.*, David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK LAW REV. 395, 401 (2020) (Exhibit I to Motion for Class Certification (Dkt. No. 31)) ("My definition of the public interest class action … include[es] only cases brought for injunctive relief against government defendants").

Public interest lawsuits often effect change in social policies, protect civil rights, protect collective rights, and address systemic injustices affecting many people in the areas of civil rights, natural resources, consumer rights, and public health. This is precisely the case here.

declaratory relief. *See, e.g.*, Complaint (Dkt. No. 1), ¶¶ 2; 39-50; 53; 54. This case is not about the extent to which individual properties are being drained. That's a fiction created out of thin air by Defendant. Nor does this case seek monetary damages or compensation for drainage.

This is a straightforward case. There is but one issue: whether the Brazos Valley Groundwater Conservation District ("BVGCD" or the "District") may apply two sets of Rules governing the production of groundwater from aquifers in the District when doing so denies landowners an opportunity to produce their fair share of groundwater.

Since September 14, 2023, there are two sets of BVGCD Rules. This is undisputed. Under the post-September 14, 2023 "New Rules," every landowner in the BVGCD, large or small, must have 400% more land to obtain a permit to produce the same amount of groundwater produced by landowners who obtained their groundwater production permits under the pre-September 14, 2023 "Old Rules." This is also undisputed. Stated another way, every landowner, large or small, with a groundwater production permit under the New Rules faces a 75% reduction in the amount of water they can produce from their land. This, too, is undisputed.

The result of BVGCD's two-tiered groundwater production regulatory system is that the putative class member landowners are deprived of the undisputed *right* to produce their fair share of the groundwater beneath their land and the undisputed *right* to protect their land from being drained. *See* August 21, 2025 Declaration of Michael R. Thornhill, Plaintiff's expert ("Thornhill Decl.") (Exhibit B to Motion for Class Certification (Dkt. No. 31)), ¶¶ 11-12. BVGCD did not submit any contravening evidence—much less, dispute—Mr. Thornhill's testimony.

Plaintiff asserts that BVGCD's two-tiered groundwater production regulatory system violates Texas law[2] and is an unconstitutional taking under the U.S. Constitution. Complaint, ¶¶ 32-38. BVGCD disagrees. Plaintiff seeks declaratory and injunctive relief requiring BVGCD to

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[2] Here's a short brief on the merits of Plaintiff's taking claim. The Texas Supreme Court, in *Gulf Land Co. v. Atlantic Refining Co.,* 131 S.W.2d 73, 80 (Tex. 1939), 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.

Here, "[c]onfiscation…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." *R.R. Comm'n v. DeBardeleben*, 305 S.W.2d 141, 143 (Tex. 1957).

Thereafter, the Texas Supreme Court, in *Marrs v. Railroad Commission,* 177 S.W.2d 941, 949 (Tex. 1944), said that "[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*." (emphasis added). In fact, *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. at 948. And in *Halbouty v. Railroad Commission,* 357 S.W.2d 364 (Tex. 1962), the Texas Supreme Court further noted:

> 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 *Gulf Land, Marrs,* and *Halbouty* pertain to oil and gas production, the Texas Supreme Court has explicitly held that oil and gas law is applicable to groundwater production because they are "not merely similar; they are drawn from each other or from the same source." *See Coyote Lake Ranch v. City of Lubbock,* 498 S.W.3d 53, 64 (Tex. 2016). Thus, denying District landowners the *right* to produce their fair share of groundwater and the *right* to protect their property from drainage is a "confiscation" (taking) of their groundwater property rights.

apply one set of groundwater production Rules uniformly across the District by, for example, simply repealing the New Rules and going back to the Old Rules. Complaint, ¶43. That way, all District landowners will have the same *right* to produce their fair share of groundwater from the aquifers under their land and the undisputed *right* to protect their land from being drained.

Contrary to the R & R, this is an easy class to certify. There's more than enough evidence and briefing in the record supporting certification. Certifying this action under Rule 23(b)(2) will ensure that the Court's merits ruling is applied fairly, evenly, and consistently by BVGCD across the District and prohibit BVGCD from taking the position with other landowners that the declaratory and injunctive relief obtained by Plaintiff only applies to Plaintiff.

Plaintiff, therefore, objects to the R & R recommending denial of class certification based on the Magistrate's erroneous analyses and findings.

LEGAL STANDARD

This Court's review is de novo. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

SPECIFIC OBJECTIONS TO THE REPORT AND RECOMMENDATION

I. The Magistrate erred in finding that Plaintiff failed to provide any evidence about the putative class members. R & R at 5-6. Not true. The August 21, 2025 Declaration of Michael R. Thornhill, Plaintiff's expert, which is uncontroverted by BVGCD, provides more than enough evidence supporting certification.

First and foremost, Plaintiff objects to the Magistrate's initial finding underpinning his recommendation that class certification be denied:

> The plaintiff has not included any affidavits or other evidence from other landowners demonstrating that they have suffered a similar harm. Relying solely on an assumption, without supporting evidence, requires the Court to make inferences on unsupported allegations. It is just as likely that all or a significant

> number of landowners purchased their land after the rule change and with full knowledge of the rule, in which case they would have suffered no harm

R & R at 5.

This finding erroneously presumes that such individual landowner affidavits or other evidence are necessary. They're not. By definition, Plaintiff and the other approximate 2,125 putative class member landowners calculated by Plaintiff's expert (Thornhill Decl., ¶ 16), and not disputed by BVGCD, have suffered (and continue to suffer) the same precise harm; to wit, groundwater production on their land will be governed under the New Rules, which will require 400% more land to obtain a permit to produce the same amount of groundwater produced by landowners who obtained their groundwater production permits under the "Old Rules." *See id.* ("The changes in Rules 6.1 and 7.1 on September 14, 2023, affect each of these owners in the same way: they are unable to apply for or produce the same amount of groundwater they would have been able to produce under permits issued before the Rules were changed."). Nowhere does BVGCD dispute this simple truth or even contest numerosity.

Nor is it just as likely—much less, even plausible—that all or a significant number of the approximate 2,125 putative class member landowners purchased their land after the September 14, 2023 Rules changes with full knowledge of the changes. But even if, for example, 95% of the putative class member landowners purchased their land after the September 14, 2023 Rules changes—which defies common sense—there would be more than enough landowners remaining to meet the numerosity standard. And even if a few landowners purchased their land after September 14, 2023 with full knowledge of the Rules changes, so what? Treating landowners differently across the District vis-à-vis their groundwater rights constitutes injury and harm and is a *per se* taking. Moreover, even if this case were governed by *Penn Central*'s

regulatory taking framework, which it's not, acquiring land after a regulation goes into effect is not a deathblow to a taking claim. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).[3]

Injury is injury. Harm is harm. And a taking is a taking. The Court should disregard and reject this erroneous finding by the Magistrate.

II. The Magistrate erred in finding that Plaintiff failed to provide sufficient evidence supporting numerosity. R & R at 6-7.

Plaintiff agrees with the Magistrate's statement of the law that "[b]efore certifying a proposed class, the court must find that the 'class is so numerous that joinder of all members is impractical.'" R & R at 6 (citing Rule 23(a)(1)). Plaintiff also agrees with the Magistrate's statement of the law that "[t]o satisfy the numerosity requirement, a 'reasonable estimate of the number of purported class members' is sufficient." *Id.* (citing *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016). Both standards are met here.

But the Magistrate erred by not using common sense when applying the law to the facts and claims of this case to reach his contrary finding. *See, e.g., Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038-39 (5th Cir. 1981) ("federal trial courts are quite willing to accept common sense assumptions in order to support a finding of numerosity.") (quoting 5 J. NEWBERG ON CLASS ACTIONS ("NEWBERG") § 8812, at 836 (1st ed. 1977)). *See also Liberty Capital group v. Oppenheimer & Co.*, No. 25-cv-4822 (JSR); 2025 WL 3507217, at *5 (S.D.N.Y. Dec. 8, 2025) (Rakoff, J.) (plaintiff "'need not provide a precise quantification of [its] class,'" and the Court "may make 'common sense assumptions' to support a finding of numerosity." (citing *Kalkstein v. Collecto, Inc.*, 304 F.R.D. 114, 119 (E.D.N.Y. 2015)).

[3] "Were we to accept the State's [notice] rule, the post enactment transfer of title would absolve the State of its obligation to defend against any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Palazzolo*, 533 U.S. at 627.

The Magistrate further opines that "the number of members in a proposed class is not determinative of whether joinder is impracticable (R & R at 6 (citing *Ibe*, 836 F.3d at 528)), but rather, "a number of facts other than the actual or estimated number of purported class members may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Id.* (quoting *Zeidman*, 651 F.2d at 1038). Again, the Magistrate fails to use common sense. Both *Zeidman* and *Ibe* sought monetary damages and certification under Rule 23(b)(3) where the putative class members had the right to receive notice and opt out. This case, other hand, is a Rule 23(b)(2) declaratory relief/injunctive relief class action not seeking monetary damages. Notice is not required (Rule 23(c)(2)(A)) and the putative class members do not have the right to opt out. Thus, for example, the ease with which class members may be identified (even though Mr. Thornhill can identify them (Thornhill Decl., ¶ 16)) and the size of each plaintiff's claim (there are no individual monetary claims) are irrelevant.

"Generally, a class of over forty members meets the numerosity requirement[.]" *Burns v. Chesapeake Energy, Inc.*, No. 5:15-cv-01016-RCL, 2018 WL 4691616, at *4 (W.D. Tex. Sept. 28, 2018). Even if, for example, 95% of the undisputed 2125 tracts at issue here calculated by Mr. Thornhill have duplicate owners, as speculated by the Magistrate (R & R at 6)—which also defies common sense—the remaining 5% of the tracts without duplicate owners (*i.e.*, 106 landowners) far exceeds the forty-member threshold and further, is consistent with the testimony of Mr. Alan Day, the BVGCD General Manager. *See* July 16, 2025 Alan Day Deposition ("Day Depo.") (Exhibit F to Motion for Class Certification (Dkt. No. 31)) at 251:24-256:20.

A reasonable estimate of the number of purported class members is sufficient to satisfy the numerosity requirement. R & R at 6. Plaintiff has provided more than enough evidence for

the Magistrate to make a common-sense numerosity determination—especially since Plaintiff's evidence is uncontroverted by BVGCD and BVGCD did not contest numerosity.

Plaintiff easily satisfies the numerosity requirement. The Court, therefore, should also disregard and reject the Magistrate's erroneous numerosity finding.

III. Plaintiff objects to the Magistrate's erroneous commonality and typicality findings, which adopt BVGCD's mischaracterization of Plaintiff's Complaint and unnecessarily and improperly overcomplicate the case. R & R at 7-8.

The Magistrate fairly states the basics of Rule 23(a)(2) commonality:

> A class action may be certified only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Putative class members must raise at least one contention that is central to the validity of each class member's claims. In re Deepwater Horizon, 739 F.3d 790, 810 (5th Cir. 2014).

R & R at 7. At bottom, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 349–50 (2011) (citation omitted). But the Magistrate misses the mark when applying the Rule 23(a)(3) commonality standard to the facts and claims of this case. Here, Plaintiff and the putative class member landowners have suffered precisely the same injury: they have been deprived of the same *right* to produce their fair share of groundwater from the aquifers under their land and deprived of the undisputed *right* to protect their land from being drained.

The Magistrate's recitation of the Rule 23(a)(3) typicality standard is too thin. R&R at 7. The complete standard is much more nuanced. "[T]he test for typicality is not demanding," *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999), and "does not require a complete identity ofclaims." *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001), *abrogated on other grounds, In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012). Rather, the class representative's claim must have the same *essential characteristics* as that of the putative class. *Morrow v. Washington*, 277 F.R.D. 172, 194 (E.D. Tex. 2011). Claims arising from a similar

course of conduct and sharing the same legal theories are typical claims even if there is factual difference between the representative and others in the class. *James*, 254 F.3d at 571.

At this juncture, the Magistrate further compounds his erroneous joint commonality + typicality analysis by asserting that "[t]hese requirements, known as the commonality and typicality requirements, necessitate some level of property-by-property inquiry," erroneously focusing on "drainage and the confiscation of groundwater." His analysis, however, totally misses the boat. No property-by-property inquiry is required or necessary.

As previously established, this case is not about the extent to which individual properties are being drained. Rather, the only issue alleged in the Complaint is and always has been about *groundwater property rights*; to wit, whether the BVGCD may apply two sets of Rules to the production of groundwater from aquifers in the District, thereby depriving the putative class member landowners of the same *right* to produce their fair share of groundwater from the aquifers under their land and the undisputed *right* to protect their land from being drained.

The Magistrate's reliance on *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) (R & R at 8) is misplaced and objectionable. It's a red herring. The taking here is *per se* and "thus *Penn Central* has no place." *Cedar Point Nursery v. Hassid,* 594 U.S. 139, 149 (2021).

But even if one goes down the Magistrate's *Penn Central* rabbit trail, he overlooks the third *Penn Central* factor: the nature of the government action. Per *Blackburn v. Dare Cnty.,* 58 F.4th 807 (4th 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. The third *Penn Central* factor ties straight back to the actual purpose of the Fifth Amendment: barring a 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, it is undisputed that by creating the two-tiered groundwater regulatory system, BVGCD is forcing the subset of putative class member landowners governed by the New Rules to sacrifice their groundwater production rights to meet BVGCD's Simsboro Aquifer Desired Future Condition (DFC) in precisely the same way: requiring the "New Rules" landowners to have 400% more land to obtain a permit to produce the same amount of groundwater produced by landowners who obtained their groundwater production permits under the "Old Rules." BVGCD's DFC burden, however, should fall on all District landowners in the same manner. So, if *Penn Central* must be considered—which it shouldn't—this factor alone confirms the taking.

In short, even if the Magistrate's thin standards are used, commonality and typicality are confirmed because (i) the putative class members have suffered precisely the same injury as Plaintiff (*Wal-Mart Stores*, 564 U.S. at 349–50), (ii) Plaintiff's claims not only have the same *essential characteristics* as that of the putative class (*Morrow,* 277 F.R.D. at 194), Plaintiff's claims are precisely identical to those of the putative class, and (iii) Plaintiff's claims arise from not only a similar—but identical—course of conduct as those of the putative class members and they all share the same legal theories; there are no factual differences. *James*, 254 F.3d at 571.

The Court, therefore, should also disregard and reject the Magistrate's erroneous commonality and typicality findings.

IV. The Magistrate erred in finding that Plaintiff will not fairly and adequately protect the interests of the class. R & R at 9.

The Magistrate fairly states the basics of the Rule 23(a)(4) adequacy standard. R & R at 9. But his objectionable application of the third prong ("the risk of conflicts of interest between the named plaintiffs and the class they seek to represent") to the facts and claims of this case as plainly pleaded in the Complaint yields an erroneous finding that is a flow-through error from his commonality and typicality analyses ("plaintiff is not an adequate representative of the putative

class because its interests *could be* [not "are"] antagonistic to the interests of others in the prospective class." *Id*. (emphasis added).

This finding is based on his erroneous observation that "[i]f part of the plaintiff's alleged harm is that those with larger properties are able to 'drain' neighboring property owners, there is potential conflict between large and small landowners." *Id*. Since we know from the rebuttal of the Magistrate's commonality/typicality findings that groundwater drainage is not the essential pillar of Plaintiff's claims, but rather, Plaintiff's claim focuses on the diminished *right* to protect against drainage, this portion of the Magistrate's analysis should be instantly disregarded.

The Magistrate also concludes that Plaintiff is not an adequate class representative because "the property of large landowners is likely more valuable because of the regulation as it limits competition from smaller land owners." *Id.* This is also a flow-through error from his erroneous commonality/typicality analyses. The size and/or value of one putative class member's land (or water underneath the land) versus another's land and underlying water are irrelevant. No property-by-property inquiry is required. Again, the only issue alleged in the Complaint is and always has been whether BVGCD may apply two sets of Rules to the production of groundwater from aquifers in the District, thereby depriving the putative class member landowners of the same *right* to produce their fair share of groundwater from the aquifers under their land and the undisputed *right* to protect their land from being drained.

The Magistrate's finding also makes no sense from a common-sense standpoint. If, for example, a Texas Railroad Commission order precluded an oil and gas lessee from developing its mineral estate, whether a taking occurred would not hinge on what impact the order had on the value of the surface estate. Nor, most likely, would the Court have any problem certifying a class of mineral rights owners challenging a Railroad Commission order that did not treat all mineral

rights owners in the same field in the same manner. This case is no different. Restricting the groundwater *rights* of some, but not all, of 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. This case should be certified under Rule 23(b)(2).

Here, Plaintiff has no interests that are antagonistic to, or in conflict with, the putative class members. Rather, Plaintiff possesses the same interests and has suffered the same injury and harm as the putative class member landowners. Plaintiff seeks to secure class-wide relief on behalf of itself, and all similarly situated District landowners. The Court, therefore, should also disregard and reject the Magistrate's erroneous adequacy finding.

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WHEREFORE, Plaintiff respectfully objects to the Magistrate's Recommendation to Deny Motion to Certify Class and requests the Court to (i) disregard and reject the Magistrate's Recommendation, (ii) certify this action as a class action under Rule 23(b)(2),[4] and (iii) appoint Marvin W. Jones, C. Brantley Jones, and Richard L. Coffman as Co-Lead Class Counsel.

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[4] Plaintiff's motion to certify this taking case under Rule 23(b)(2) is not novel. Here are four examples of cases where the courts found class certification of takings claims to be proper:

- *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018) (district court erred in dismissing per se taking; 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).

Date: March 25, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2026, I served a true and correct copy of Plaintiff's Objections to the Magistrate's Report and Recommendation to Deny Motion to Certify Class on Defendant's counsel via email and the Court's electronic filing system.

/s/ *Richard L. Coffman*
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