

shall not “be taken for public use, without just compensation.” That is, this is a takings case, and only a takings case (albeit an improper, invalid takings claim).

The Complaint alleges that the District’s amended Rules render certain groundwater wells no longer “economically feasible” (Doc. 1 at ¶ 16), that “investment-backed expectations” have been “thwarted” (Doc. 1 at ¶ 38), that those Rules “substantially devalued Plaintiff’s and Class Members’ groundwater property rights” (Doc. 1 at ¶ 26), and that those Rules subject landowners to “drainage” of groundwater beneath their land (Doc. 1 at ¶¶ 18, 35). Thus, if it is a regulatory takings case (which it is, as pleaded), it requires a plaintiff-by-plaintiff *Penn Central* analysis as to the degree of impact/devaluation, each plaintiff’s expectations, and all other *Penn Central* factors that precludes class certification. Alternatively, if it is a *per se* physical invasion takings case (which it is, as pleaded), it requires a property-by-property “drainage” analysis that precludes class certification. It is not some broad “civil rights” case. It is not an Equal Protection case. It is pleaded as a takings case plainly alleging regulatory and *per se* physical invasion takings effects and factors, and must be examined as such.

After full briefing and argument, and a hearing at which Plaintiff presented no additional evidence, the Magistrate Judge recommended denial of class certification because Plaintiff failed to carry its burden under Rule 23. That recommendation rests on two straightforward principles: (1) class certification must be evaluated based on the claim actually pleaded, and (2) Rule 23 requires proof, not characterizations, of commonality, typicality, adequacy, numerosity, and entitlement to Rule 23(b)(2) relief

based on the pleaded claim. The Report & Recommendation correctly applies both. Plaintiff's objections, however, fail to correctly implicate either.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 72(b), the Court reviews specific objections to a report and recommendation de novo. But objections must do more than reargue the motion or present a different theory of the case. They must identify a specific error in the magistrate judge's reasoning or factual findings, grounded in the record. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) (district court "need not consider frivolous, conclusive, or general objections").

ARGUMENT

A. The magistrate judge examined the case through the correct lens because the live Complaint controls.

The starting point for class certification is the claim pleaded. A plaintiff cannot obtain certification based on a theory different from the one asserted in its complaint. The Magistrate's Report & Recommendation appropriately considered certification in light of Plaintiff's pleaded takings claim found in its Complaint, including the alleged effects of the District's amended Rules on groundwater flow, production, and value, well placement, and the economic feasibility of development on particular tracts.

Plaintiff's objections depart from that framework and attempt to recast the case. As pleaded, however, the takings claim turns on how the District's rules affect specific landowners and properties and the questions that logically follow about effects on any one property: whether a well can be drilled, where it can be located, whether production is economically viable given tract size and geometry, the impact (if any) on a tract's value,

and the impact (if any) of nearby wells. The Magistrate Judge correctly denied class certification based on the tract-specific questions and issues raised by the pleaded claim.

1. *Takings claims of the kind Plaintiff pleaded are structurally incompatible with class treatment.*

The constitutional takings claim Plaintiff chose to plead is, by its nature, ill-suited to class adjudication. That is not a criticism of takings litigation, but a description of how takings law works.

A takings claim under the Fifth Amendment is an intensely individualized inquiry. Whether a regulation constitutes a taking of real property *at all* depends on what it does to a specific piece of property, owned by a specific person, with specific investment-backed expectations, put to specific uses. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–124 (1978). The constitutional question is not whether the government acted badly in the abstract. It is whether the government went “too far” as applied to this property owner’s rights. *See Id.* The answer almost always turns on facts that vary from parcel to parcel. *Id.* at 124 (whether a restriction constitutes a taking “depends largely ‘upon the particular circumstances [in that] case.’” (cleaned up)).

Unlike claims involving a uniform product defect, a standard-form contract, or a categorical exclusion from a government benefit, a takings claim (particularly as to a regulation applied to a piece of real property) requires the factfinder to examine the economic impact of the regulation on each claimant’s property, the extent to which the regulation interferes with each claimant’s reasonable expectations, and what use each claimant made or intended to make of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18, 630 (2001) (noting the *Penn Central* factors and holding that plaintiff’s

challenge to limitations on the use and value of the land must go back to the trial court to consider “the merits of petitioner’s claim under *Penn Central*.”). None of those inquiries yield a single class-wide answer.

Even on the rare occasions where courts have granted class certification of takings or takings-adjacent claims—the cases Plaintiff cites in its footnote—those cases involved government action that allegedly worked a “direct appropriation” of property.¹

This case is quite different. As pleaded, it is a regulatory taking/impact case, not a direct appropriation case. The District’s rules at issue here interact with acreage, geometry, aquifer position, existing wells, economic value of tracts, and development history in ways that vary among individual tracts and across the District. The same rule change that allegedly renders a 35-acre tract commercially non-viable may have an entirely different effect—or no material effect—on a 350-acre or 3,500-acre parcel. That variance is not incidental to the claim; it *is* the constitutional analysis.

Plaintiff’s answer to this problem is to try to recast the injury at a level of abstraction high enough to look uniform: everyone is subject to two sets of rules,

¹ Each of the first three cases cited by Plaintiff as takings class actions (*Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018); *Garcia Rubiera v. Calderon*, 570 F.3d 433 (1st Cir. 2009); and *Vargo v. Barca*, No. 20-cv-1109-jdp, 2023 U.S. Dist. LEXIS 166562 (W.D. Wis. Sep. 18, 2023)) were *per se* takings claims predicated on the government’s alleged direct appropriation of funds or financial assets. The only class-member-specific issue of effect/impact in each case thus was the *value* of the funds or assets taken, which could easily be determined in each case. The final case, *Reimer v. State*, 392 S.W.3d 635 (Tex. 2013) also was a limited “direct appropriation” claim, brought by a small set of landowners all affected by a single river boundary determination on a twelve-mile stretch of land marked by the same survey incorporating the river gradient boundary set by the state.

therefore everyone suffers the same harm.² But even that reframing does not change the constitutional inquiry—it just postpones it. This is precisely what Rule 23 does not permit. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (certification improper where individualized issues predominate over class-wide ones).

The structural mismatch between takings doctrine and class procedure is not merely academic here. It explains why Plaintiff’s entire presentation at the certification stage looks the way it does: thin on evidence about class members, heavy on characterizations of the District’s conduct, and focused on the government’s behavior rather than on the claimants’ alleged injuries. That framing fits an equal protection challenge or perhaps an administrative appeal of a District’s rulemaking. It does not fit a Fifth Amendment takings claim brought on behalf of hundreds of landowners with different properties, different histories, different economic impacts, and different stakes in the outcome. Those differences preclude class certification.

² Even that characterization is incorrect, per the sequence of events pleaded in Plaintiff’s Complaint. There has never been more than one set of rules in effect at any time. The District’s Rules have always applied equally to landowners at any given moment in time; 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 to Defendant Brazos Valley Groundwater Conservation District’s Response to Plaintiff’s Motion for Class Certification (Doc. 39)).

2. *Plaintiff's attempt to escape Penn Central is unavailing.*

Despite its Complaint pleading and implicating multiple *Penn Central* factors, Plaintiff insists that *Penn Central* has “no place” in this case because the taking is *per se* under *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). That strategy reveals Plaintiff’s realization that the case in its Complaint is not suited for class certification. *Penn Central*’s multi-factor balancing test requires individualized analysis of economic impact investment-backed expectations to determine whether a taking has occurred at all. Each of those inquiries is inherently tract-specific and landowner-specific, and must be addressed in light of a Complaint that complains of thwarted “investment-backed expectations,” “devalued” property interests, and the like. *Penn Central* applies, so class certification fails.

Plaintiff’s fallback argument that the rules effectively “confiscate” groundwater by allowing “drainage” allegedly caused by neighboring landowners fares no better. That theory, even if legally cognizable, is precisely the local-hydrology-based, property-by-property inquiry that the Magistrate Judge correctly identified as incompatible with class treatment. To determine whether any given landowner’s groundwater is being drained, and whether that drainage is more than “ordinary drainage” that might rise to the level of a constitutional taking, would require evidence about each parcel’s aquifer position, surrounding permitted wells, production rates, and hydrology.³ Plaintiff submitted no such evidence for any putative class member.

³ See Mem. Op. and Order at 11–12, *BLF Land, LLC v. N. 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

Plaintiff's attempt to sidestep its pleaded *Penn Central* claim is an acknowledgment that the legal argument it would need to make to survive class certification cannot be made on this record or on the case pleaded in its Complaint. The attempt to escape *Penn Central* and the attempt to escape individualized inquiry are the same move. Both fail for the same reason: Plaintiff built no evidentiary record about the putative class, and no analytical framework, however artfully framed, can substitute for evidence that was never submitted.

3. Plaintiff's "two sets of rules" argument is a disguised equal-protection claim that plaintiff chose not to plead.

Stripped to its core, Plaintiff's objection rests on a single grievance: the District applies different rules to pre-September 2023 permit holders than to post-September 2023 applicants, and that differential treatment is constitutionally impermissible. (Doc. 64 at 2, 9.) That is an equal protection argument, not a takings argument.

However, Plaintiff pointedly did not plead an equal protection claim. That is not an accident. This Court has previously considered a materially similar equal protection challenge to the District's rules brought by related parties represented by the same counsel, and summarily dismissed it.⁴ Having learned from that experience, Plaintiff

prove 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. to Defendant Brazos Valley Groundwater Conservation District's Response to Plaintiff's Motion for Class Certification (Doc. 39)).

⁴ See n.2, *infra*, citing Order at 5, *Fazzino v. Roe, et al.*, No. 6:18-CV-00114-JCM (Aug. 23, 2021) (finding that a similar "temporal break" in the District's rules between comparators defeated an allegation of unequal treatment).

now attempts to cloak the same theory in a Fifth Amendment's Takings Clause costume, relabeling the alleged disparity as a "*per se* taking" and invoking the language of confiscation by drainage. The packaging has changed; the underlying grievance—and its lack of merit—has not.

The problem with this maneuver is threefold. First, it is procedurally improper. Plaintiff cannot press a theory through class certification that it did not plead in the complaint. A party seeking class certification is bound by the claims it brought, not the claims it later wishes it had brought. Second, it confirms that Plaintiff's real objection to the District's rules is one of differential regulatory treatment based on the timing of permit applications, exactly the kind of government-wide policy challenge that, if valid at all, would have to travel via a different legal vehicle entirely. Third, and particularly relevant here, it demonstrates why Rule 23 certification is inappropriate: if the true theory is that the District should not be permitted to apply two tiers of rules to different landowners, the remedy is uniform application of one rule, and the Court's ruling on that question as to one plaintiff would bind the District as to all landowners regardless of whether a class is certified. Class certification adds nothing except procedural complexity and the risk of binding absentee plaintiffs who may not share or may even be opposed to Plaintiff's litigation interests.

The "equal protection" shadow indelibly cast by Plaintiff's theory reinforces why the Magistrate Judge was right to deny certification. Plaintiff is not really asking the Court to adjudicate individual takings claims on behalf of a class. It is asking the Court to invalidate a regulatory framework based on "unequal" application—a request that

does not require a class, cannot support one, and should not be dressed up as a takings claim.

B. The Rule 23 prerequisites are interlocking, and Plaintiff's failure to satisfy one reflects a failure on all.

Plaintiff treats Rule 23's four prerequisites—numerosity, commonality, typicality, and adequacy—as if they were entirely independent “checkboxes.” They are not. The requirements play together. They share a common logic, and the evidentiary gaps that doom one doom the others for the same underlying reason.

The unifying deficiency here is Plaintiff's failure to produce any evidence about the putative class members in relation to the claim pleaded in its Complaint. Not an affidavit from a single other landowner. Not a declaration about any other property's development history, commercial intentions, investment-backed expectations, loss of value, or acreage constraints. Not a word about what any other class member has experienced, suffered, or stands to gain or lose from the relief sought. No hydrological analysis examining purported drainage on *any* specific property. Plaintiff submitted an expert declaration that generally describes and identifies tracts of land meeting the proposed class definition. That is it.

These evidentiary gaps apply across every Rule 23 element. Commonality fails because the only common question Plaintiff identifies—whether two sets of rules from pre-September 2023 and post-September 2023 exist—does not generate a common answer to the constitutional question the case actually presents of whether a taking occurred as to any landowner. Typicality fails because Plaintiff's tract is one of many with different sizes, geometries, and development histories, and there is no evidence that

its unique situation mirrors the class. Adequacy fails because without knowing who the class members are or what interests they hold, Plaintiff cannot demonstrate alignment, and the record suggests divergence. And numerosity fails because Plaintiff cannot translate a tract count into an injured-person count without evidence about the landowners themselves.

These failures are harmonics of the same root problem. Plaintiff never built the evidentiary record that Rule 23 requires. Of course, that is because Plaintiff could not do so in connection with the *Penn Central* regulatory taking claim and *per se* taking-by-drainage claim it actually pleaded.

1. Commonality and Typicality.

Plaintiff contends that the Magistrate Judge erred in his commonality and typicality analysis by focusing on the pleaded injury of drainage rather than what Plaintiff now characterizes as the core injury: the existence of two versions of rules differing based on timing. But that reframing misstates both the Complaint and the analysis.

The Magistrate Judge analyzed the claim in the Complaint, which includes allegations that the Rule changes reduce or eliminate landowners' ability to offset drainage and prevent confiscation of water by producing neighbors. (Doc. 1 at ¶¶ 18, 19.) Plaintiff cannot disclaim that theory now because it precludes class certification (indeed, Plaintiff continues to complain of “drainage” at least five times in its Objections (Doc. 64)).

More fundamentally, even accepting Plaintiff's simplified framing, Rule 23(a)(2) requires more than a common question—it requires a common question “capable of

classwide resolution” in “one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Whether the application of the amended Rules constitutes a taking as to any given landowner depends on factors that vary among landowners and properties, such as economic impact and interference with investment-backed expectations. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Plaintiff’s additional *per se* theory does not resolve that problem. Even under *Cedar Point*, a *per se* physical-invasion taking requires an actual occupation/invasion, a showing that would require property-by-property evidence where invasion by “drainage” is alleged,⁵ not class-wide inference. *See Cedar Point*, 594 U.S. at 151–152.

Plaintiff failed to provide any evidence about impacts on any putative class member’s property, development intentions, or investment expectations. Without that foundation, neither commonality nor typicality can be established. And as described above, that failure is not an isolated deficiency, it is the same absence of evidence that defeats every other Rule 23 element.

2. Adequacy.

The Magistrate Judge’s adequacy finding is independently supported by the record and by Plaintiff’s own allegations. Plaintiff objects that potential conflicts between large and small landowners are irrelevant because drainage is “not the essential pillar” of its claims. But Complaints are not instruments of degree; either a claim is pleaded or it isn’t. Plaintiff’s pleadings consistently allege that the rule changes reduce landowners’ ability to protect against drainage, a harm that by Plaintiff’s own

⁵ *See* n.3, *infra*.

theory runs in different directions depending on a landowner's relative acreage and position with respect to nearby wells.

The adequacy inquiry under Rule 23(a)(4) encompasses three distinct elements: (1) the zeal and competence of counsel; (2) the willingness and ability of the representative to protect the interests of absentees; and (3) the risk of conflicts of interest between the named plaintiff and the class. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005). The Magistrate Judge's analysis correctly focused on the third element.

The proposed class encompasses landowners with materially different interests. Landowners with larger tracts are likely to have a competitive advantage under the current regulatory scheme precisely because the acreage-based requirements insulate them from lower-acreage competition. If the Court were to grant the relief Plaintiff seeks, repealing the amended Rules and returning to the pre-2023 framework, it would benefit smaller landowners at the expense of larger ones who have structured their operations under the current rules. Plaintiff offers nothing to show that its interests align with those of the full class it seeks to represent.

Plaintiff's argument that conflicts are irrelevant because "injury is injury" sidesteps the adequacy inquiry entirely. The question is not whether all class members share some common grievance in the abstract. It is whether the named plaintiff can fairly and adequately protect the divergent interests of all class members across the litigation in light of the takings injuries they have incurred (if any). Plaintiff has presented no evidence establishing alignment of interests or willingness to be bound by

the outcome. That failure is fatal to adequacy, and it flows directly from the same evidentiary void that undermines numerosity, commonality, and typicality.

Plaintiff also ignores a distinct adequacy problem arising from the proposed relief itself. Plaintiff asks the Court to repeal the amended Rules district-wide and restore the prior framework. But some landowners within the proposed class may prefer the current rules, may have organized their land use around them, or may benefit from their competitive effects. Pursuing classwide declaratory and injunctive relief on behalf of landowners with fundamentally different interests in the outcome is precisely what the adequacy requirement is designed to prevent.

3. *Numerosity.*

The Magistrate Judge also correctly found that Plaintiff failed to satisfy the numerosity requirement. First, the issue is not whether the District contested the point—the burden belongs to Plaintiff, not the District. *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 253 (5th Cir. 2020).

Second, Plaintiff's expert identified approximately 2,125 tracts of land meeting the proposed acreage-based class definition but expressly acknowledged that “many of the identified tracts are under the same ownership.” Doc. 31-2 at ¶ 16. A class, however, would have to be composed of injured *landowners*, not parcels. Plaintiff offered no evidence translating a tract count into a person count, and no evidence that any of those landowners actually suffered or claim a cognizable injury cognizable under the pleaded claim.

Plaintiff counters that even if 95% of the tracts share owners (which percentage is not evidence, but is yet another unsupported hypothetical), more than 100 individual

landowners would remain, which Plaintiff contends is enough to satisfy numerosity. But that arithmetic depends on an assumption layered atop an assumption, with no evidentiary support for either. Rule 23 requires proof, not speculation. *Wal-Mart Stores, Inc.*, 564 U.S. at 350. A court may rely on “reasonable, common-sense assumptions,” but the starting data must itself rest on evidence, not inference alone. *Ogden v. AmeriCredit Corp.*, 225 F.R.D. 529, 531 (N.D. Tex. 2005).

There is also a more fundamental problem. Even accepting Plaintiff’s tract-count figure, the requested class definition is limited to landowners who do not have a pre-September 14, 2023, permitted or drilled well. Whether any given landowner in that universe suffered a cognizable injury depends on facts the record does not establish: whether the landowner had any intention to produce groundwater commercially, whether the rules as applied to their specific tract render production infeasible, and whether they acquired the land before or after the rule change with knowledge thereof (relevant to the investment-backed expectations element), and the relative value of their tract(s) as a whole. The Magistrate Judge’s observation that some landowners may have purchased post-amendment and thus had different expectations is not idle speculation, but rather identification of an evidentiary gap Plaintiff never filled.

That gap also infects commonality, typicality, and adequacy. The class cannot be counted, characterized as similarly situated, or represented fairly when its members—and the facts unique to each of them—remain entirely unknown to the Court.

CONCLUSION

Plaintiff’s objections do not show misapplication of Rule 23, misstatement of record facts, or failure to consider relevant evidence. Rather, Plaintiff simply reurges its

motion by trying to reframe its claim in a way that is not reflected by the pleadings, functionally disclaims the takings claim actually pleaded in the Complaint, and fails to identify any evidentiary or legal error in the Report & Recommendation. The objections are not a substitute for the evidentiary record Plaintiff never built. Rule 23 required Plaintiff to prove—with evidence, not argument—that the class it sought to represent was real, defined, injured in the same way, and capable of being represented fairly. Plaintiff did not do so, actually pleaded itself out of doing so in its Complaint, and no amount of post-hoc reframing can supply what was not submitted.

Accordingly, Defendant respectfully requests the Court overrule Plaintiff's objections and adopt the Magistrate Judge's Report & Recommendation in its entirety, and for any and all other relief to which Defendant may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2026, 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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