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 REPLY IN SUPPORT OF ITS OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION TO DENY MOTION TO CERTIFY CLASS

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiff respectfully submits this Reply in support of its Objections to the Magistrate Judge's Report and Recommendation to Deny Motion to Certify Class ("R&R").

INTRODUCTION

Here we go again. Defendant Brazos Valley Water Conservation District ("BVGCD" or the "District") continues to cherry pick Plaintiff's Complaint and ignore the rest. Here, BVGCD latches on to Plaintiff's regulatory taking allegations like a junkyard dog, but ignores Plaintiff's alternatively pled *per se* taking allegation. *See, e.g.,* Complaint (ECF #1), ¶ 19.

BVGCD's Response repeats the same fundamental error contained in the R&R: it treats a class wide challenge to a constitutionally and statutorily flawed two-tier groundwater regulatory regime as though Plaintiff is required to prove individualized liability and injury for every putative class member before certification can be granted. But in this declaratory relief case, what is required is a common contention that is "capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores v. Dukes,* 564 U.S. 338, 350 (2011). That is certainly the case here because Plaintiff pleads: BVGCD has acted in such a manner that every class member's groundwater property *rights* have been violated in precisely the same manner wherein relief can be afforded to them in the single stroke of a pen—a holding that disparate groundwater production limits in the same aquifer within the District cannot stand. *See* Complaint *passim*; *see also Marrs v. Railroad Comm'n,* 177 S.W.2d 941, 949 (Tex. 1944).

BVGCD ignores the gravamen of Plaintiff's Complaint. To be clear, Plaintiff complains that the 2023 BVGCD Rules changes deprived it and the class member landowners across the District of their constitutionally protected real property *rights*; to wit, the equal *right* to produce

their fair share of the groundwater beneath their land and the equal *right* to protect their land from being drained. Nowhere in its Complaint does Plaintiff—as suggested by BVGCD without references—focus on individual landowners' idiosyncratic preferences, individual uses, money damages, and/or specific water molecules. They aren't pleaded.

Defendant's Response myopically focuses on *Penn Central*, suggesting that that's the "case Plaintiffs pleaded." *Id*. at 1. But Plaintiff pleads both a *per se* taking (Complaint (ECF #1), ¶ 19), which obviates the need to go down the *Penn Central* rabbit hole, and a regulatory taking. Pleading in the alternative is absolutely allowed by the Federal Rules of Civil Procedure. *See* Rule 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.").

Notably, neither BVGCD's Response, nor the Magistrate's R&R, address the undisputed fact that the District's New Rules are not fair and impartial. Nor do they address the undisputed fact that the District literally imposes two different groundwater production Rules on different landowners in the same aquifer throughout the District based solely on a calendar date and not on hydrology or any science whatsoever—as required by TEX. WATER CODE §36.0015(b). Nor do they address the undisputed fact that this two-tier groundwater production regulatory scheme strips Plaintiff and the class member landowners of their *right* to produce their fair share of the groundwater beneath their land and the *right* to protect their land from being drained.

Respectfully, the Magistrate missed the boat and BVGCD Response only compounds the error. The Magistrate's R&R must be rejected.

ARGUMENT AND AUTHORITY

I. BVGCD's Response is based on a false premise: that this is a parcel-by-parcel taking case, rather than a uniform challenge to BVGCD's two-tier groundwater production regulatory scheme.

BVGCD repeats the same erroneous reframing of Plaintiff's Complaint animating the Magistrate's R&R: that Plaintiff's claims require tract-by-tract proof of drainage, value diminution, individual expectations, and economic impact. But that's not the case Plaintiff pleads. The Complaint clearly and straightforwardly challenges BVGCD's adoption and implementation of two disparate sets of Rules governing District landowners' groundwater property rights in the same aquifer.

This two-tier regulatory scheme, however, violates longstanding Texas law. *See Marrs*, 177 S.W.2d at 949 ("[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) and *Halbouty v. Railroad Comm'n,* 357 S.W.2d 364, 374 (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.")—both of which apply to groundwater pursuant to *Coyote Lake Ranch v. City of Lubbock,* 498 S.W.3d 53, 64 (Tex. 2016) (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.").

Texas law cannot be any clearer. BVGCD's two-tier groundwater production regulatory scheme violates Texas law and deprives Plaintiff and the class member landowners of the *right* to produce their fair share of groundwater and the *right* to protect their property from being drained. *See also* TEX. WATER CODE § 36.101(a)(2);(a)(3) (requiring the District to "consider

groundwater ownership and rights" and "develop rules that are fair and impartial."). Wildly disparate groundwater production limits based *solely* on a calendar date, rather than on science as required by TEX. WATER CODE § 36.0015(b), are neither fair nor impartial. The Magistrate, however, doesn't comprehend these fundamental concepts of Texas water law and BVGCD deftly sidesteps them, not attempting anywhere to justify its two-tier regulatory scheme in any briefing submitted to this Court at any time in this case.

Plaintiff alleges that BVGCD's two-tier regulatory scheme effects a taking across the board, asserting that the scheme impacts every class member landowner's property *rights* in the same way regardless of the property's size, location, acquisition date, and/or the landowner's use preferences. Every landowner who does not have a pre-September 14, 2023 groundwater production permit has lost the fair opportunity to produce a fair share of the groundwater underneath his or her land and the right to prevent his or her land from being drained—both of which are constitutionally protected rights. *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831 (Tex. 2012); *Stratta v. Roe,* 961 F.3d 340, 359-60 (5th Cir. 2020). Plaintiff, therefore, moved for certification of a class seeking declaratory and injunctive relief against a uniformly bad policy (the two-tier groundwater production regulatory scheme) that applies equally to a large group of District landowners, which is the classic use of FED R. CIV. P. 23(b)(2).

BVGCD's effort to convert Plaintiff's uniform policy challenge into a series of individualized taking claims is not a certification argument; at best, it's a merits argument—and even then it makes no sense. But the U.S. Supreme Court has repeatedly warned that courts must not decide the merits under the guise of class certification. *See, e.g., Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the

extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); *Miller v. Mackey International,* 452 F.2d 424, 427 (5th Cir. 1971) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."). The false premise underlying the Magistrate's R&R and BVGCD's Response should be disregarded and rejected.

II. BVGCD's *Penn Central* argument does not preclude class certification.

BVGCD devotes substantial space in its Response to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Response at 2, 4, 5, 7, 8, 11, 12. But it's a waste of paper. Plaintiffs' request for non-monetary declaratory and injunctive relief from a two-tier groundwater production regulatory scheme that universally harms District landowners' property rights does not fall under the *Penn Central* rubric. Rather, class certification turns on whether the challenged conduct and requested relief can be adjudicated through common questions. They can.

BVGCD's *Penn Central* analysis also misses the point because nowhere in the Complaint does Plaintiff claim that every affected tract of land has suffered precisely the same downstream economic effect. Why? Because that is not what this case is about. Plaintiff's claim is that BVGCD applied a substantively unequal groundwater production Rule structure that burdens a defined set of landowner *rights* in the same legal way. That presents a common question of law, which neither the Magistrate, nor BVGCD, understands or challenges.

III. BVGCD's "drainage" refrain distracts from Plaintiff's actual pleaded claims and does not defeat commonality.

BVGCD spends page after page insisting this case is really about property-by-property drainage. Response at 2, 7, 8-12. But that's the reddest of red herrings. It's pure fiction. Nowhere in the Complaint does Plaintiff even remotely insinuate that a property-by-property analysis is

required or plead a claim requiring such. In fact, Plaintiff pleads the opposite. A careful reading of the Complaint will confirm this indisputable fact. Plaintiff pleads one over-arching claim and one over-arching claim only: BVGCD's adoption and application of a two-tier groundwater production scheme deprives similarly situated District landowners of their *right* to produce a fair share of the groundwater under their land and the *right* to protect their land from being drained. The fact BVGCD conjures up a tract-by-tract drainage argument is not surprising; it has not (and cannot) legally justify the scheme and really has nothing else to argue.

Commonality requires a common contention capable of class wide resolution, not uniformity of every factual detail. *Wal-Mart*, 564 U.S. at 350. Plaintiff pleads precisely this kind of contention here: whether BVGCD may lawfully enforce two sets of wildly disparate groundwater production Rules that operate differently across similarly situated District landowners. This issue is central to the validity of each class member's claim. BVGCD's repeated insistence on a parcel-specific drainage analysis is a fictionalized attempt to deflect the Court's attention from the undisputed fact that it is BVGCD's class wide conduct—not individualized landowner circumstances—at the heart of this case.

The commonality bar "is not a high one," *Rodriguez v. National City Bank*, 726 F.3d 372, 382 (3d Cir. 2013), and "[b]ecause the requirement may be satisfied by a single common issue, it is easily met[.]" *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (citation omitted). Plaintiff's allegations easily clear the commonality bar.

IV. The numerosity bar is also not high. Plaintiff easily clears it, too.

A threshold finding of numerosity is a low bar to meet, and "where the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity. ... The wise practice is to allow such cases to proceed, at least at the onset, as class actions." *Evans v.*

U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983). *See also See Bowles v. Sabree*, 121 F.4th 539, 553 (6th Cir. 2024) (Numerosity is a "low bar to clear.").

Rule 23 (a)(1) requires that the proposed class is "so numerous that joinder of all members is impracticable." Plaintiffs generally must "demonstrate some evidence or reasonable estimate of the number of purported class members." *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016) (citation omitted). A class of approximately 100–150 members is "within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624–25 (5th Cir. 1999). The Fifth Circuit has also cited favorably Professor Newberg's treatise that a class of more than forty members "should raise a presumption that joinder is impracticable." *Mullen*, 186 F.3d at 624 (citing 1 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 3.05 (3d ed. 1992)). That said, the First Circuit noted:

> Although notice to and therefore precise definition of the members of the suggested class are important to certification of a subdivision (b)(3) class, *notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited.* In fact, the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often "incapable of specific enumeration."

Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972). This is a Rule 23(b)(2) class.

There are "no mechanical rules" courts apply to assess numerosity. *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992), *on reh'g*, 53 F.3d 663 (5th Cir. 1994). Instead, courts focus "on the practicability of joining all class members individually." *Id.* Here, common sense is important. *See, e.g., Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038-39 (5th Cir. 1981) (courts are quite willing to accept common sense assumptions to support a finding of numerosity) (quoting NEWBERG § 8812 (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).

Setting aside the fact that BVGCD has no standing to comment on numerosity since it did not challenge numerosity in its class certification briefing, BVGCD's chirping about numerosity here (Response at 10, 11, 14, 15) is based on nothing but speculation—principally because it submitted no evidence contravening numerosity and has nothing else to argue. *See* Response at 14-15. (speculating that many of the tracts in the putative class may share owners or that some owners may have acquired their property after the Rules changes, which is irrelevant (*see Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001)). BVGCD's chirping should be disregarded.

Plaintiff's expert identified approximately 2,125 tracts within the proposed class and BVGCD's General Manager testified that "it seem[s] logical" that the proposed class contains more than one hundred (100) properties." Given Plaintiff's uncontradicted expert testimony that there are 2,125 putative class members, corroborated, in part, by BVGCD's General Manager, and leavened with a bit of common sense, joinder here is impracticable. Plaintiff easily clears the numerosity bar in this Rule 23(b)(2) class action. This isn't even a close call.

V. BVGCD's typicality and adequacy arguments are unsupported and internally inconsistent.

BVGCD argues that Plaintiff is not typical and not adequate because some hypothetical putative class members may benefit differently from the challenged rules. Response at 13. But if every class action could be defeated by hypothesizing about how some Rule 23 (b)(2) putative class members might prefer the challenged policy to be changed, no class action for declaratory or injunctive relief could ever proceed. That's not the law—especially in Rule 23(b)(2) class actions where notice and the ability to opt out is not required. *See* FED. R. CIV. P. 23(c)(2)(A); *Mullen*, 186 F.3d at 625; *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 134-35. (5th Cir. 2005).

This case is about BVGCD depriving a class of District landowners 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. Whether an individual landowner decides not to exercise these rights does not change the undisputed fact that BVGCD's Rules changes deprived the landowner of such rights.

Typicality does not require identity of facts; it only requires that the class representative's claims arise from the same event or course of conduct and are based on the same legal theory as the putative class. *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001) (in a Rule 23(b)(2) class, a 42 U.S.C. § 1983 theory of liability is "the same for all Plaintiffs"). The typicality standard is satisfied here because Plaintiff and the putative class challenge BVGCD's New Rules for the same reasons and seek the same declaratory and injunctive relief under 42 U.S.C. § 1983.

Nor does BVGCD establish an actual conflict sufficient to defeat adequacy. The adequacy inquiry asks whether the representative will fairly and adequately protect the interests of the class. *Feder*, 429 F.3d at 130. Plaintiff states that it has no conflicts with the other class member landowners. Fazzino Decl. (Exhibit A), ¶ 4. This is uncontroverted. BVGCD offers no evidence to the contrary. Instead, BVGCD posits abstract possibilities that some landowners might prefer the current regulatory regime. Response at 14. But that is utter nonsense. It defies comprehension that any landowner anywhere would prefer a groundwater regulatory scheme that reduces its rights by 75%. Without hard evidence to the contrary, common sense must prevail

VI. Rule 23(b)(2) is especially appropriate here.

This case seeks declaratory and injunctive relief from BVGCD's New Rules. This is precisely the kind of case Rule 23(b)(2) was designed to cover. *See Wal-Mart*, 564 U.S. at 360; *Yaffe*, 454 F.2d at 1365–66.

BVGCD's contrary position would distort Rule 23(b)(2) into near nullity in constitutional cases involving governmental regulations. If a government's wrongful actions could escape class

treatment merely by asserting that each affected person experiences the challenged policy somewhat differently, then a class challenge to a facially uniform and equally bad regulatory scheme would never be certifiable. Again, common sense must prevail.

VI. The R&R should be rejected because it conflates certification with the merits.

The core error in the R&R is methodological. It assumes Plaintiff must prove, at the certification stage, the merits of each class member landowner's taking claim and then denies certification because Plaintiff didn't do so. But that's backwards. The certification inquiry asks whether the Rule 23 prerequisites are met; it does not require Plaintiff to prove liability for each class member before the class exists. *See, e.g., Amgen*, 568 U.S. at 466–68. Here, Plaintiff seeks declaratory and injunctive relief, not money damages. Even then, the full merits of Plaintiff's claims are established by the undisputed fact that BVGCD's disparate groundwater production rules across the same aquifer violate Plaintiff's *right* to produce its fair share of the groundwater beneath its land and the *right* to protect its land from being drained. Whether a class member landowner has an individual money damages claim is not pled nor relevant to the inquiry here.

BVGCD doubles down on this erroneous line of thinking, asking the Court to reject class certification because Plaintiff's claims might ultimately require individualized proof in some respects. Response at 4-7, 9. But that's a false presumption since the challenged conduct, the legal theory, and the requested relief here are all indisputably uniform class wide.

CONCLUSION

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

Date: April 14, 2026

Respectfully submitted,

/s/ *Richard L. Coffman*

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2026, I served a true and correct copy of Plaintiff's Reply in Support of its 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*
Richard L. Coffman