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 RESPONSE IN OPPOSITION TO DEFENDANT'S
SECOND MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiff Fazzino Investments, LP ("Plaintiff") respectfully files this Response to Defendant Brazos Valley Groundwater Conservation District's ("BVGCD" or the "District") Second Motion for Summary Judgment ("Second Motion") (Dkt. #78).

INTRODUCTION

This case boils down to two simple questions. May BVGCD apply two different sets of groundwater production rules to the same aquifer within the District? And if the Court determines the BVGCD cannot, then what do BVGCD's actions constitute if not a taking?

BVGCD's Second Motion attempts to avoid the central constitutional problem in this case by reframing Plaintiff's claims in a classic strawman fallacy.[1]

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[1] A straw man fallacy occurs when one distorts or exaggerates another person's argument and then attacks the distorted version of the argument instead of refuting the original point. By using a straw man, one can give the appearance of refuting an argument when they have not actually engaged the actual argument before them. *See* https://owl.excelsior.edu/argument-and-critical-thinking/logical-fallacies/logical-fallacies-straw-man/.

BVGCD's Second Motion is grounded on two false premises: that Plaintiff does not have a constitutionally protected *right* to a fair opportunity to produce a fair share of the groundwater beneath its land, and that Plaintiff cannot complain of "ordinary drainage." But BVGCD wholly ignores the holding of the Fifth Circuit in *Stratta v. Roe*, 961 F.3d 340, 354 (5th Cir. 2020), a case involving BVGCD before this very Court. BVGCD also focuses only on two words ("ordinary drainage") from *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814, 831 (Tex. 2012), the seminal case on groundwater ownership. But these two words actually prove Plaintiff's case.

An essential tactic in crafting BVGCD's strawman fallacy is its mischaracterization of Plaintiff's claims. Plaintiff asks for a declaratory judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201, not monetary damages. But BVGCD ignores this critical distinction and proceeds to spin its arguments around its created strawman.

To be clear, Plaintiff seeks a declaration about whether BVGCD may constitutionally impose two radically different sets of groundwater production rules on neighboring landowners producing from the same aquifer based solely on the date a groundwater production permit was issued—thereby depriving one class of landowners of the *right* to produce their fair share of groundwater and to deprive them of their related *right* to offset production. That kind of entrenched differential treatment is not hypothetical; it is embodied in BVGCD's current groundwater production Rules and in its own calculation of what Plaintiff may and may not produce from its tract. There is a real, concrete, present controversy to be resolved here.

The undisputed evidence establishes that BVGCD intentionally amended its Rules to require post-September 14, 2023 groundwater production permit applicants to own four times more acreage to produce the same amount of groundwater as pre-September 14, 2023 groundwater production permit holders. Plaintiff's evidence also undisputably establishes that the New Rules reduce Plaintiff's economically feasible groundwater production by 75%[2] and destroy Plaintiff's related ability to offset drainage from neighboring wells permitted under the Old Rules. BVGCD's Second Motion admits the New Rules reduce Plaintiff's allowable production from what otherwise would have been available under the Old Rules while allowing Old Rules permit holders to continue unabated.[3] This constitutional injury is sufficient as a matter of law to invoke the Court's jurisdiction to render a declaratory judgment.

It is also undisputed that BVGCD has the power to impose rules to regulate groundwater production and conserve groundwater. But BVGCD does not have the power to impose the burden of conservation on a subset of groundwater owners based solely on an arbitrary date. BVGCD glibly asserts that Plaintiff is not harmed because it still has the right to produce some amount of groundwater. But it is further undisputed by BVGCD that the New Rules slice Plaintiff's groundwater production rights by 75%, making it impractical to drill an expensive water well. *See* Thornhill Declaration (Exhibit A) at ¶ 10. BVGCD has not submitted any contravening expert reports. Nor will BVGCD grant any exception to its New Rules. Deposition of Alan Day (Exhibit B), BVGCD's General Manager, at 53:7-22; 77:1-78:6; 150:3-15.

It is not necessary for Plaintiff to physically apply for a groundwater production permit under the Old Rules (and be denied) and/or drill a radically smaller water well just to prove it cannot produce the same amount of groundwater it could have produced under the Old Rules.

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[2] *See* Exhibit 5 to Plaintiff's Second Motion for Summary Judgment.

[3] BVGCD claims it treats everyone equally under its Rules. What this really means is that BVGCD treats all pre-September 14, 2023 groundwater production permit holders equally as a group under the Old Rules, and treats all post-September 14, 2023 groundwater production permit holders equally as a group under the New Rules. Deposition of Alan Day at 267:8-268:6. But that's hardly the same as applying one set of groundwater production Rules uniformly across all landowners in the District.

This is but another fallacy conjured up by BVGCD. That said, BVGCD's Second Motion fails for the following four reasons:

1. BVGCD improperly attempts to convert Plaintiff's declaratory judgment claims into a damages case requiring Plaintiff to prove existing measurable depletion beneath its tract.

2. BVGCD ignores Texas Supreme Court authority holding that groundwater owners possess constitutionally protected correlative *rights*, including the *right* to a fair opportunity to produce their fair share of the groundwater under their land and prevent confiscation through drainage.

3. BVGCD misapplies *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978) by (i) ignoring the fact that Plaintiff does not sue for damages, but rather, for a declaration of its constitutionally protected *rights*, and (ii) insisting upon parcel-wide value testimony even though Plaintiff seeks declaratory and injunctive relief against a discriminatory regulatory regime that destroys recognized property *rights*.

4. BVGCD's attempt to distinguish *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) and *Marrs v. Railroad Commission,* 177 S.W.2d 941 (Tex. 1944) fails because BVGCD's New Rules take the valuable *right* to exclude others from private property, a point actually strengthened by the "ordinary drainage" language in *Edwards Aquifer Authority v. Day, supra*.

<u>BVGCD ADMITS THE CORE FACTS UNDERLYING PLAINTIFF'S CLAIMS</u>

The material facts relevant to Plaintiff's constitutional claims are undisputed.

- BVGCD admits Plaintiff owns a 69-acre tract over the Simsboro Aquifer.
- BVGCD admits Plaintiff does not possess a pre-September 14, 2023 groundwater production permit.
- BVGCD admits that under the New Rules, Plaintiff may produce substantially less groundwater than similarly situated neighboring landowners in the District operating under the Old Rules.

- BVGCD admits that the New Rules require approximately four times more acreage to produce the same volume of groundwater allowed to be produced under the Old Rules.
- BVGCD admits that neighboring pre-September 14, 2023 groundwater production permit holders are unrestrained by the New Rules.

BVGCD further admits Plaintiff may produce only approximately 587 acre-feet of groundwater annually under the New Rules (Deposition of Alan Day at 150:16-22) and admits Plaintiff could produce approximately 1,170 acre-feet of groundwater under the Old Rules. Deposition of Alan Day at 152:24-153:7. BVGCD thus concedes that the New Rules materially impair Plaintiff's groundwater production *rights*.

These admitted facts alone create a constitutional problem for BVGCD under Texas law because it creates and administers a discriminatory correlative-rights groundwater production regime within the same aquifer.

ARGUMENT

I. BVGCD mischaracterizes Plaintiff's claims.

BVGCD repeatedly argues that Plaintiff cannot prove a taking because Plaintiff cannot identify measurable current drainage beneath its tract. But Plaintiff's claim has never depended on proving present volumetric depletion of the groundwater beneath its land. Plaintiff does not seek monetary relief. Rather, it requests a declaration challenging the constitutionality of BVGCD's two-tiered groundwater production Rules.

The Federal Declaratory Judgment Act authorizes this Court to declare the rights and other legal relations of any interested party whether further relief is or could be sought. *Public Service Com. v. Wycoff Co.,* 344 U.S. 237, 241 (1952) ("The Declaratory Judgment Act of 1934, now 28 U. S. C. § 2201, styled 'creation of a remedy,' provides that in a case of actual controversy a competent court may 'declare the rights and other legal relations of a party' whether or not further relief is or could be sought."). The predicate requirement is that there exists an actual controversy: a real, concrete dispute. That's clearly the case here.

Plaintiff's constitutional injury arises because BVGCD's two-tiered groundwater production regulatory regime deprives Plaintiff of (i) the *right* to produce its fair share of groundwater underneath its land, and (ii) the *right* and ability to offset drainage from neighboring wells operating under the materially more favorable Old Rules governing groundwater production in the District.

Texas law has long recognized these property rights as *protected* property rights. The Texas Supreme Court held decades ago that confiscation occurs when regulation deprives one owner of a fair opportunity to recover the minerals beneath his land while neighboring owners are permitted to produce disproportionately. *See Marrs*, 177 S.W.2d at 948–49; *Gulf Land Co. v. Atlantic Refining Co*., 131 S.W.2d 73, 80 (Tex. 1939).

BVGCD's position that Plaintiff must prove present measurable depletion beneath its tract improperly rewrites both Texas takings law and Plaintiff's pleadings.

II. BVGCD's "ordinary drainage" argument proves Plaintiff's case.

BVGCD attempts to dismiss Plaintiff's injury by asserting Plaintiff cannot recover for "ordinary drainage," the only words from *Day* BVGCD cites. BVGCD Second Motion at 12, 18 fn.6, 21-22, 26 (citing *Day*, 369 S.W.3d at 830). "Ordinary drainage" under Texas law presumes reciprocal offset rights. Texas' rule of capture jurisprudence has always depended on the assumption that neighboring owners possess substantially equal opportunities to protect themselves by drilling offset wells. *See, e.g., Hous. & T.C. Ry. Co. v. East,* 81 S.W. 279, 281 (1904); *Stephens County v. Mid-Kansas Oil & Gas Co*., 254 S.W. 290, 292 (Tex. 1923) ("If the owners of adjacent lands have the right to appropriate, without liability [*i.e.*, the rule of capture], the oil and gas underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own."). BVGCD destroyed the reciprocity here by imposing radically unequal groundwater production Rules.

The Texas Supreme Court recognized in *Day* that a landowner possesses "a right to exclude others from groundwater beneath his property." *Id*., 369 S.W.3d at 830. BVGCD quotes *Day* selectively by emphasizing the phrase "cannot be used to prevent ordinary drainage" (BVGCD's Motion at 12, 18 fn.6, 21-22, 26), while ignoring the context in which that statement operates. The Court was describing the traditional reciprocal framework of the rule of capture, a framework where neighboring owners possess substantially equal drilling rights. *Day* did not authorize the government to impose discriminatory production restrictions that eliminate one owner's practical ability to protect against drainage while preserving another's.

BVGCD's position also conflicts with the historic rationale for the rule of capture articulated in *East* itself. Texas adopted the rule not because drainage was inherently fair, but because courts believed it was administratively impractical to police subsurface migration where all owners retained equal rights to compete for the resource. *East,* 81 S.W. at 280-81 ("The mere quantity of water taken by the owner from his land has nowhere been held to affect the question."). BVGCD's New Rules eliminate that equality. Once the government selectively restricts one owner's ability to compete while preserving another's, the principal justification for the rule of capture disappears. At that point, drainage is no longer "ordinary," but rather, government-enabled confiscation. *Marrs,* 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.").

The Texas Supreme Court recognized in *East* that groundwater naturally migrates beneath adjoining lands and that one owner generally cannot complain when another produces groundwater that migrates across property lines. *Id.*, 81 S.W. at 280. But that principle rests entirely on the assumption that each owner remains free to protect itself by drilling competing wells. *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 14 (Tex. 2008) ("The rule of capture is justified because a landowner can protect himself from drainage by drilling his own well, thereby avoiding the uncertainties of determining how gas is migrating through a reservoir."). That reciprocal right of self-help is the foundation of the rule of capture. "First, the law already affords the owner who claims drainage full recourse. This is the justification for the rule of capture, and it applies regardless of whether the drainage is due to fracing. If the drained owner has no well, he can drill one to offset drainage from his property." *Id.*

Thus, BVGCD cannot simultaneously argue that (i) Texas law permits drainage because neighboring owners can protect themselves through self-help, and (ii) BVGCD may constitutionally deprive Plaintiff of the practical ability to engage in that self-help while preserving it for neighboring owners. These two propositions are fundamentally incompatible.

Under BVGCD's two-tiered groundwater production regulatory scheme, pre-September 14, 2023 groundwater production permit holders may continue producing under legacy standards requiring only one-fourth the acreage now required of Plaintiff. As such, neighboring landowners may continue producing large-volume wells while Plaintiff is denied the same practical ability to drill economically viable offset wells. Once BVGCD imposed radically unequal production restrictions on post-2023 groundwater production permits, the resulting drainage ceased being "ordinary" in any meaningful sense under Texas law.

The Texas Supreme Court recognized this precise principle in the oil and gas context in *Marrs*, which holds that drainage becomes confiscatory when regulation deprives one owner of the fair opportunity to protect against drainage while neighboring owners continue producing. The Court emphasized:

> 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.

Id., 177 S.W.2d at 948. This is the critical point BVGCD ignores. The constitutional issue is not merely that drainage occurs; it is that the government selectively disables one owner's ability to respond to drainage while preserving that ability for neighboring owners.

BVGCD's "ordinary drainage" argument, therefore, collapses under its own logic. If the drainage truly were "ordinary" under Texas rule of capture principles, then Plaintiff necessarily must retain the same practical ability to protect itself that neighboring owners enjoy. But Plaintiff does not. BVGCD intentionally created a two-tier groundwater production system in which one class of owners retains robust production rights while another class is subjected to drastically reduced production rights. This arrangement destroys the mutuality that makes the rule of capture constitutionally tolerable in the first place.

III. BVGCD misapplies *Penn Central*.

A. BVGCD erroneously wields *Penn Central* as a rigid set of elements.

BVGCD extensively argues Plaintiff cannot satisfy *Penn Central* because, *inter alia,* Plaintiff lacks appraisal testimony regarding the value of its "parcel as a whole." BVGCD's Motion at 5, 14. BVGCD's formulaic reliance on *Penn Central* fails for at least four reasons.

First, BVGCD improperly treats *Penn Central* as a talismanic and exclusive framework of factors governing Plaintiff's claims. This, however, mischaracterizes Plaintiff's claims, as well as misinterprets *Penn Central*. In fact, the Supreme Court stated that the "factors" are merely "relevant considerations" in an "ad hoc, factual" inquiry that is not governed by any "set formula." *Id.,* 438 U.S. at 123.

Second, Plaintiff seeks declaratory and injunctive relief—not monetary damages of any kind. Plaintiff simply challenges the constitutionality of BVGCD's discriminatory groundwater production regulatory framework. BVGCD cites no authority holding that formal appraisal testimony is a prerequisite to maintaining such claims.

Third, *Penn Central* notes that in connection with the "nature of the government action" a regulation might pass muster if it "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 438 U.S. at 124. But *Penn Central* also points to boundaries on this inquiry, condemning government actions that "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

Here, it is undisputed that BVGCD was concerned about meeting a conservation goal[4] when it changed its Rules and put the burden of meeting that goal disproportionately on those landowners that applied for groundwater production permits after September 14, 2023. Conservation is clearly a goal that, in fairness and justice, should be borne by all groundwater rights owners in the District. Indeed, Texas law compels BVGCD to give all landowners within its jurisdiction a fair opportunity to produce a fair share of the groundwater underneath their land. *Stratta v. Roe,* 961 F.3d at 359; *Day,* 369 S.W.3d at 830; 840; *Marrs,* 177 S.W.2d at 948; *Halbouty v. Railroad Com.,* 357 S.W.2d 364, 370 (Tex. 1962). This is not a case where the Court may permissibly weigh whether BVGCD may disproportionately burden Plaintiff's property as

[4] Deposition of Alan Day (Exhibit B), at 268:13-269:9.

part of a program benefiting the public. That sort of calculus fails to meet the duty to provide Plaintiff and all other landowners within the District a fair opportunity to produce a fair share of the groundwater underneath their land. Placing the burden of conservation on a certain subgroup of landowners necessarily prevents them from exercising their fair opportunity to produce a fair share of the resource underneath their property.

So, what is the character of the government action here? BVGCD's two-tiered groundwater production regulatory scheme literally allows one set of landowners to produce four times as much water from the same amount of acreage as Plaintiff. There could be no clearer afront to Texas law requiring BVGCD to give Plaintiff (and all other landowners within the District) the fair chance to produce a fair share of their groundwater. In the *ad hoc*, fact-driven analysis of *Penn Central,* the character of the government action factor predominates.

If BVGCD believed conservation required immediate curtailment, it could have imposed proportional restrictions District-wide. Instead, it froze one class of groundwater production permit holders under favorable historical standards while permanently burdening another class with dramatically more restrictive requirements.

Finally, even under *Penn Central*, the economic impact evidence is substantial. Plaintiff's expert established that (i) BVGCD's New Rules reduce Plaintiff's groundwater production rights by approximately 75%, (ii) commercially viable Simsboro Aquifer wells require approximately 700 GPM or 1,100 acre-feet annually, and (iii) Plaintiff's tract does not support an economically feasible commercial groundwater well under the New Rules. Thornhill Declaration (Exhibit A) at ¶¶ 9, 10. Plaintiff's groundwater property *rights*, therefore, have suffered (and continue to suffer) severe economic impairment. BVGCD offers no controverting evidence—expert or otherwise. Plaintiff's uncontroverted evidence, at the very least, is sufficient to create a fact issue precluding summary judgment under *Penn Central*.

B. BVGCD incorrectly argues Plaintiff lacks investment-backed expectations.

BVGCD next argues that Plaintiff lacks reasonable investment-backed expectations because it acquired the tract by gift and has not yet drilled a water well. BVGCD Second Motion at 15. But *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) teaches that a takings claim is not barred by the "mere fact that [] title was acquired after the effective date of the state-imposed restriction." *Id.* at 630. If BVGCD's approach is correct, taking title by inheritance would wipe out any taking claims related to subsequent government actions, however wrong. Setting aside the fact that this position defies common sense, it directly conflicts with Texas groundwater law. It also focuses on the wrong expectations. And it elevates the *Penn Central* analysis to a bright-line set of elements, which it is not.

Groundwater ownership is a vested real property right. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d at 831. The Texas Water Code expressly provides that landowners "own[] the groundwater below the surface of the landowner's land as real property." *Id*. at § 36.002(a). Plaintiff's expectations arise from vested ownership itself—not merely from sunk drilling costs. If BVGCD's theory is correct, constitutional protection would exist only if a landowner spent millions of dollars buying the land and developing a water well. That is not the law. Nor should it be. BVGCD's position would mean that those who inherit land could never challenge a subsequent regulatory action regardless of the constitutional harm of that action merely because they are heirs and not direct purchasers. That's not the way real property rights work in the United States. Or Texas.

BVCGD's argument also ignores the undisputed fact that BVGCD preserved the full production expectations of pre-September 14, 2023 permit holders while stripping those same expectations from neighboring landowners solely because they had not yet obtained groundwater production permits. This disparate treatment is exactly what renders the New Rules confiscatory.

In short, BVGCD's rigid arguments concerning the application of *Penn Central* miss the mark. *Penn Central* does not apply here, and if it did, it would confirm a government taking.

IV. BVGCD's attempt to distinguish *Marrs* fails.

BVGCD repeatedly argues that *Marrs* does not apply here because *Marrs* has never been applied to groundwater. BVGCD Second Motion at 20. BVGCD's argument is especially bold given the Fifth Circuit's opinion in a case involving BVGCD that originated in this very court.

In *Stratta v. Roe*, the Fifth Circuit had before it the same argument advanced by BVGCD here. *See* Brief of Appellees, *Stratta v. Roe,* No. 18-50994 in the United States Court of Appeals for the Fifth Circuit, Document 00514905424 (Exhibit C) at 18-19. The Fifth Circuit specifically rejected BVGCD's argument:

> The district court dismissed Fazzino's takings and equal protection claims because it believed that they rested on unsettled questions about the application of oil and gas law to the landowner's rights in the groundwater beneath his property. . . . Neither the state Supreme Court nor the legislature is blind to differences between groundwater and oil and gas reserves that may require legal distinctions to be drawn. See, e.g., id. at 830-31, 840-41. Still, the court has explained, "[c]ommon law rules governing mineral and groundwater estates are not merely similar; they are drawn from each other or from the same source." *Coyote Lake Ranch v. City of Lubbock*, 498 S.W. 3d 53, 64 (Tex. 2016). This common parentage led the court in *Day* to analogize the correlative rights as between landowners in common subsurface reservoirs, whether of minerals or water as being recognized both at common law and more particularly through state regulation that "afford[s] landowners their fair share of the groundwater beneath their property." *Day*, 369 S.W.3d at 830; see also *Elliff v. Texon Drill. Co*., 146 Tex. 575, 210 S.W.2d 558, 562-63 (Tex. 1949).

Stratta, 961 F.3d at 359.

In dispelling the notion that landowners have no property interest in groundwater beneath their land, the Texas Supreme Court relied heavily on oil and gas law because both substances are fugacious and subject to the rule of capture, which itself underlies the principle of absolute ownership. To disclaim the applicability of *Marrs* to this case disingenuously turns a blind eye to Texas law as it has developed for 125 years. The Fifth Circuit, in *Stratta*, also gave this Court specific instructions:

> Fazzino's allegation is that by permitting the City of Bryan to drain water from an area with a 3003 ft. radius, far outside its surface ownership and including surface area of Fazzino's property, the BVGCD has "taken" his groundwater in place without compensation. The task of the district court will be to assess, as the state supreme court did in *Day*, whether the groundwater scheme effectuated by BVGCD's Rules promulgated in December 2004 has resulted in a taking of Fazzino's interest. Id. at 838. That this task may be challenging is not the same as concluding it is infeasible. See *Bragg*, 421 S.W.3d at 153 (affirming judgment against the Authority for "taking" of landowners' property).

Id. at 360. Not surprisingly, BVGCD's Second Motion does not reference *Stratta*—most likely because the holdings in *Stratta* compel this Court to reject the Second Motion from the get-go.

Marrs focused on the denial of the right to protect against future drainage—not merely on already-completed depletion. The constitutional injury arose because neighboring owners could continue producing while the complaining owners were prohibited from effectively offsetting drainage. That is exactly what occurs here. Under BVGCD's Rules:

- Pre-September 14, 2023 groundwater production permit holders may continue producing under materially less restrictive spacing and acreage requirements;
- Plaintiff cannot economically offset such production because Plaintiff must satisfy substantially more burdensome acreage requirements; and
- Plaintiff, therefore, lacks the fair opportunity to protect its groundwater rights recognized by Texas law.

Significantly, in its appellate briefing in *Stratta,* BVGCD recognized the implications of applying *Marrs* to this case:

> Separate from groundwater, Texas has reconciled the rule of ownership-in-place with the law of capture in one context by protecting correlative rights of oil and gas owners. *See Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 15 (Tex. 2008). Thus, "each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by lawful operations conducted on his own land." *Elliff*, 210 S.W.2d at 583. At the same time, the other owners of the common source of supply each have a right to prevent another owner from exercising "their privileges of taking so as to injure the common source of supply." *Id.*

Brief of Appellees, *Stratta v. Roe* (Exhibit C) at 22. Thus, BVGCD's attempts to discount *Marrs* fail on all fronts.

V. BVGCD mischaracterizes Plaintiff's *Cedar Point* theory.

BVGCD argues *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) is inapplicable because BVGCD did not authorize literal physical entry onto Plaintiff's surface estate. That argument reads *Cedar Point* far too narrowly.

Cedar Point emphasized that the right to exclude is among the most fundamental property rights protected by the Constitution. As noted above, the rule of capture is viable only where a landowner has an equal opportunity to produce a fugacious substance—which is a right to effectively exclude his neighbor from capturing oil, gas, or water from beneath his property. Plaintiff's correlative rights include the right to exclude by producing its water on an even playing field. BVGCD's Rules effectively take that right away by tipping the scales toward Old Rules groundwater producers.

By limiting Plaintiff to 25% of the production capacity of adjacent pre-2023 permit holders, BVGCD has stripped Plaintiff of any meaningful ability to "erect an effective barrier" to invasive cones of depression. Thornhill Declaration (Exhibit A) at ¶ 13. This is an appropriation of Plaintiff's right to exclude and an actionable taking under *Cedar Point*. As noted above, the concept of "ordinary drainage" is dependent on co-equal rights to produce. Absent such rights, there is no "ordinary drainage." Instead, there is a government taking of Plaintiff's *right* to prevent what is now "extraordinary drainage."

VI. BVGCD's "it's still there" argument should be rejected.

BVGCD also argues that there is no "foul" here because the groundwater is still under Plaintiff's land and can be produced infinitely into the future. BVGCD Second Motion at 7-8, 17, 19. This argument fails for at least three critical reasons.

First, BVGCD may not evade the duty to avoid takings on the premise that a landowner is left with a token interest. *Palazzolo,* 533 U.S. at 631.

Second, the New Rules limit Plaintiff's ability to produce water today. Stating that the water is still available is not the same as allowing Plaintiff its statutory right to produce the groundwater. TEX. WATER CODE § 36.0015. Landowners in the District who have permits under the Old Rules can produce four times as much water today under the same land surface as Plaintiff. But Plaintiff cannot use a proportional amount of groundwater to raise crops today.

Here, if Plaintiff chose to irrigate crops on its land, it would have only 25% as much water as its Old Rules neighbors. The ability to raise crops would be correspondingly reduced. The potential for income follows. A prospective buyer of the land (and the corresponding water rights) would not be buying the same right to raise crops as buyers of land governed by the Old Rules. Incredibly, BVGCD argues that this does not deprive Plaintiff of a constitutionally protected right.

Finally, if BVGCD's argument is true that groundwater is infinitely available for all time regardless of the amount of production by Old Rule permitees, then what is the need to regulate groundwater production amounts?

BVGCD's argument proves too much. It proves that the Rules limiting groundwater production are unnecessary, and further, that the draconian reduction in rights of landowners under the New Rules is even more unnecessary. Police power is not unlimited: regulation must be necessary as well as reasonable and non-arbitrary. *State v. Spartan's Industries, Inc*., 447 S.W.2d 407, 417 (Tex. 1969) ("Under Texas law, the exercise of the police power is valid only if the regulation is substantially related to a legitimate public purpose and the means adopted are reasonable, non-arbitrary, and reasonably necessary to accomplish that purpose.").

In *Stratta*, BVGCD's hydrogeologist, John Seifert, testified that if the number of water wells in the District was doubled, the groundwater beneath the District would be reduced less than 1% after 50 years. [5] Given BVGCD's position in its Second Motion, and given Mr. Seifert's testimony, at the very least, a material fact issue exists as to whether either the Old Rules or the New Rules are necessary. This is a fundamental issue undercutting BVGCD's actions in this case and its regulatory legitimacy in general. In truth, this supports granting Plaintiff's Motion for Summary Judgment.

On the other hand, if groundwater in the District is a finite resource, then every owner of groundwater rights must be given a fair opportunity to produce a fair share of the groundwater. BVGCD either argues against the necessity of any groundwater production limits or argues itself into a violation of Plaintiff's right to produce a fair share of the groundwater beneath its land.

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[5] April 12, 2021 Deposition of John Seifert in *Stratta v. Roe* (Exhibit D) at 75:17 – 76:5.

CONCLUSION

BVGCD's Second Motion ignores the central constitutional defect in its groundwater production Rules: neighboring landowners producing from the same aquifer are subject to radically different production allocations based solely on the date their groundwater production permits were issued. Texas law has condemned that type of regulatory treatment for decades.

Plaintiff presents substantial uncontroverted evidence that BVGCD's New Rules deprive Plaintiff of the fair opportunity to produce its groundwater, as well as prevent Plaintiff from protecting against drainage from neighboring groundwater wells operating under the materially more favorable standards of the Old Rules.

The controversy here is undisputed and present. BVGCD has already amended its Rules to cap the amount of Simsboro groundwater Plaintiff can ever produce from its tract at 587.1 acre-feet per year, while allowing Old Rule permittees to continue producing substantially greater volumes under the much more favorable Old Rules. BVGCD's witnesses acknowledge that Plaintiff has never been, and never will be, eligible for an Old Rule permit on its tract; that the New Rule's groundwater production cap materially restricts Plaintiff's potential groundwater production relative to those grandfathered users; and that BVGCD will apply the challenged New Rules to any permit application Plaintiff might file. These facts create a live, concrete dispute about Plaintiff's present groundwater production rights and the legality of BVGCD's two-tier groundwater production regulatory scheme. This dispute exists now, regardless of whether drainage has already been measured beneath Plaintiff's property or whether Plaintiff can presently offer an appraisal quantifying diminution in the value of its tract—which is a faux requirement conjured up by BVGCD out of thin air.

Because Plaintiff challenges BVGCD's existing two-tiered groundwater production regulatory scheme and BVGCD's announced application of it to Plaintiff's tract (but does not seek any monetary damages), Plaintiff's claim is ripe for declaratory adjudication. BVGCD's Second Motion for Summary Judgment (Dkt. #78), as well as its First Motion for Summary Judgment (Dkt. #54), should be denied.[6]

Date: July 31, 2026.

Respectfully submitted,

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[6] For the same reasons BVGCD's summary judgment motions should be denied, Plaintiff's Motion for Summary Judgment (Dkt. #66) should be granted.

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2026, I served a true and correct copy of Plaintiff's Response in Opposition to Defendant's Second Motion for Summary Judgment (Dkt. #78) on Defendant's counsel via email and the Court's electronic filing system.

/s/ *Marvin W. Jones*
Marvin W. Jones