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Texas Supreme Court Hears Oral Arguments In Guitar Water Case

By Colleen Schreiber

AUSTIN – Oral arguments for what is touted to be the most important water case to reach the Texas Supreme Court since the 1999 *Sipriano* case were heard recently.

Guitar v. Hudspeth Co. UWCD No. 1 is the first case addressing the powers of groundwater districts covered by Chapter 36 of the Water Code to rise through the courts, therefore much attention has been paid to this case by groundwater districts throughout the state and by state policymakers as well. The number of people who tried to watch the oral arguments live on the Internet was so great that it reportedly caused an overload of sorts in the system.

The case merited enough attention that oral arguments were replayed in their entirety at the recent Texas Water Law Institute Conference sponsored by the University of Texas School of Law.

"This is a big case and a big fight over a minor aquifer that essentially pits the farmers against the ranchers," remarked Third Court of Appeals judge Jan P. Patterson. "The case involves important issues of statutory construction (pertaining to Chapter 36 of the Texas Water Code), not the least of which is the meaning of historic use."

The question before the court, Patterson told listeners, is whether the district's rules with respect to transfer permits discriminate against Guitar and other ranchers who do not have historic use.

"Guitar argues that the district's rules unlawfully protect the existing and historic use of groundwater for irrigation purposes, that it in fact grants the farmers a preference — to them an unlawful preference — to transfer and market water," Patterson said.

The key issue before the Supreme Court appears to be whether when Chapter 36 authorizes protection of historical use, is referring to a volume of use or a particular purpose of use.

The Hudspeth Co. UWCD No. 1, referred to from here forward as "the water district" or "the district," was created in 1955 primarily to protect the Bone Spring-Victoria Peak Aquifer. The Bone Spring Aquifer is one of two minor aquifers in Hudspeth County. The battle centers around the small community of Dell Valley, a water-rich community in the middle of the desert in far West Texas. Prior to 1947 the Dell Valley area was primarily cattle ranching, but with development of irrigation in the 1950s it became a farming area.

In 1990 the district adopted rules establishing a permit system

whereby landowners had to acquire a permit before drilling, equipping or altering the size of a well. The rules also allowed landowners to apply for a certificate validating an existing well, regardless of when it was drilled, by providing information identifying the location of the well. Furthermore, the rules gave all landowners five acre-feet of water per acre per year regardless of the proposed use. However, the rules placed a strong limitation on the right to transfer groundwater out of the district.

Beginning in 1997 the Texas legislature made sweeping changes to water regulation with the passage of Senate Bill 1 and later SB 2. Specifically, these bills made significant changes to Chapter 36 of the Water Code. The long and the short was that with the passage of SB 2, some of the water district's rules were no longer valid because they conflicted with the changes made to Chapter 36 with respect to transfer. In 2002 the district repealed those rules and established a new set.

The new rules designated a historic use period from 1992 through 2002. Landowners who could prove use during that designated timeframe could apply for a validation permit. However, unlike the old rules, in which the amount potentially allocated depended on surface acreage, the new rules said that the amount the landowner was entitled to depended on whether or not and to what extent the land had been irrigated.

The petitioner's brief on the merits of the case explains this more clearly.

"For every acre the landowner irrigated during that period (historic and existing use period) the rules allow him to withdraw as much as four acre-feet per year, and guarantee him an annual irrigation allotment of at least three acre-feet. By contrast, if a landowner did not irrigate this land, but instead used groundwater for any other non-exempt use, the amount of water he is entitled to produce is the maximum amount of water he beneficially used in any one year during the Existing and Historic Use Period."

Landowners who couldn't show that they'd used groundwater during the historical period could apply for an operating permit. This permit is based on surface acreage, but as the petitioner's brief points out, it is also dependent upon the level of the aquifer reaching a certain elevation. Furthermore, those who have validation permits not only have priority over operating permits, but they are also guaranteed at least three acre-feet regardless of the aquifer level.

The new rules also require anyone wishing to export water out of the district to obtain a transfer permit. To obtain a transfer permit, however, landowners must first have either a validation permit or an operating permit. In addition, the amount of water that can be exported is linked to the amount authorized in the operating permit or validation permit. Therefore the rules heavily favor the validation permit holder because, as the petition's brief states, the validation permit holder "is entitled to a transfer permit to sell as much as 2.8 acre-feet of that groundwater per year (the maximum amount that may be transferred is 70 percent of the guaranteed four acre-feet). By contrast, land that was not irrigated receives

no guaranteed allocation if the average water elevation of the Aquifer does not exceed the threshold value of 3580 feet."

Guitar owns more than 38,000 acres. The family traditionally has been involved in ranching, not farming. Therefore their historic use during the defined period was minimal. Several of the amicus briefs filed on their behalf contend that they were conserving the water, and because of that they are now being penalized by the district's rules. Guitar applied for permits under the district's old rules and was granted the right to transfer 162 acre-feet per year.

However, three other applicants, Cimarron, CLM, RBB and Triple B, all farming operations owning far less acreage than Guitar, were collectively given the right to transfer 38,057.23 acre-feet of water per year, more than 60 percent of all the annual available groundwater as defined by the district. The district determined that only 63,000 acre-feet of water available from the aquifer could be used annually, either for consumptive use or for transfer outside the district.

Guitar filed four lawsuits against the district which were consolidated. The first challenged the rules; the other three were appeals of permit decisions of the district under the new rules.

The trial court upheld the validity of the district's rules but denied the district's request for attorney fees and litigation expenses; the court upheld the validation and transfer permits the district issued to Cimarron, CLM and RBB and upheld the district's action on Guitar's permit applications, but ordered the district to refund certain administrative deposits to Guitar. Finally, the court upheld the validation and transfer permits the district issued to Triple B.

Guitar appealed. Again the district prevailed. In a unanimous published opinion, the court of appeals upheld the validity of the district's rules.

Guitar filed a petition for review before the Texas Supreme Court. That review was granted.

In oral arguments before the Texas Supreme Court, Guitar's attorney, Russ Johnson, told the court repeatedly that the case is not about challenging the authority of the legislature or the provisions within Chapter 36. Nor is it about individual water districts' right to protect and preserve historic use.

"This case is not about undoing the groundwater regulatory framework that the legislature has provided in SB 1, 2 and 3. In fact, it is just the opposite," Johnson told the court. "This case represents an opportunity for the court to advise groundwater districts of the extent of the authority and the limits on that authority, and in this case the specific limit on the authority to protect or preserve historic use."

Guitar also charges that the water district's rules violate the equal protection clause with their specific provisions allowing the conversion of preserved historic use to a new use of transfer when every other new user

is treated differently.

"Chapter 36.122(q) says that a district can't adopt a rule that says if you want to export you only get one acre-foot but if you want to use it in-district you get two or three acre-feet," Johnson told the court. "They cannot make a distinction in terms of a new application based on where the water is going to go."

In his opening remarks, Renea Hicks, attorney for the water district, argued that Guitar is in fact challenging the structure set up in Chapter 36 by the legislature.

"When you look behind what I consider the impenetrable statutory argument, this case really asks the court whether it meant what it said in 1999 in *Sipriano*."

In *Sipriano* the court upheld the rule of capture. Justice Enoch delivered the opinion for a unanimous court. Justice Hecht filed a concurring opinion, in which Justice O'Neill joined.

Enoch wrote that "*Sipriano* presents compelling reasons for groundwater use to be regulated. But unlike in *East*, any modification of the common law would have to be guided and constrained by constitutional and statutory considerations. Given the Legislature's recent efforts to regulate groundwater, we are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix by substituting the rule of reasonable use for the current rule of capture."

In saying that the *Guitar* case is really about *Sipriano*, Hicks was really pointing to the final paragraph of the opinion in which Enoch refers to the legislature's recent efforts to regulate groundwater.

Hicks argued that the district's rules follow Chapter 36 precisely in terms of recognizing historic use. Giving preference to those with historic use, he said, is a way to recognize those who have "invested in the community.

"This is in the desert. We have to have some basis for allocating this water. So we said if you produced water — pumped it up and used it, it doesn't matter how — it just so happens here it's mainly agriculture irrigation. If you used it in the defined period, you get a permit to produce it in the future essentially keyed to what you used before — four acre-feet per acre."

"There's nothing wrong with protecting the farmer's investment in farming," Johnson countered. "What is wrong is granting him the exclusive right to protect a resource that is shared by everybody."

During oral arguments the justices seemed to focus on a couple of key points, one being this definition of "use." Before the Guitars' attorney could even finish his opening line, Justice David Medina asked for an explanation of "use."

Johnson responded that "use" is used throughout Chapter 36 in the

context of both the type — to what use does one put the water — and also the amount of use.

Johnson commented that the Chapter 36.116(b) of the Water Code clearly gives groundwater districts the power to exempt existing or historic use. However, pointing to 36.113(e), Johnson insisted that in making changes to SB 2 the legislature clearly intended that when a permit holder changes its use or changes the character of the protected use, it is to be considered a new use.

Hicks argued that "use" means an amount, not a purpose of use or kind of use.

Justice Harriett O'Neill, however, pointed to another provision of Chapter 36 which basically says specific to transfer of water out of a district that all users must be treated the same.

"We treat users the same," Hicks assured. "We have said that if you were an in-district user that was an irrigator, which is nearly everyone out there, you essentially get to use up to 70 percent of the water that you pump when irrigating crops.

"To treat exporters the same as in-district users we say you have to produce, that's natural. Then if you want an export permit you can export 70 percent of what you can produce, which is equivalent to the consumption that you used if you engaged in and produced it inside the district," he explained.

To which Justice O'Neill responded: "I understand the rules, but this does sort of create a franchise for prior users to use water in a different way."

Justice Nathan Hecht offered a similar comment.

"The troubling thing about it is that transfer was not a historic use," Hecht said.

Hicks was argumentative, countering again that "use" is not a "kind" of use.

Then, as if to remind the attorneys whose courtroom it was, Justice O'Neill said, "Well, that's what we're here to decide."

"Well, it isn't the only thing and it clearly is not a kind of use… if you look at the way the definitions are set up, it can't possibly be a kind of use," Hicks argued. "Historical means the amount used. If you look at 36.001(9) you can see that there is a clear distinction between use as an amount and the purpose of the use. It talks about use for a beneficial purpose and then it defines what the purposes are which are agricultural, municipal and so on, but it distinguishes use from purpose."

Hicks also pointed to a provision that deals with when a district is evaluating an application to move water out of a district. The old provision, he noted, said districts could look at the amount and purpose of use. In SB 2, however, he reminded, the legislature changed that provision

to say that a district can no longer look at purpose of use.

"In 36.001(29), which was added in 2005, they specifically talk about use as an amount. It only makes sense if you talk about it as an amount, not the kind of use."

It was clear that O'Neill wasn't the only justice who had expressed concerns about the impartiality of the district's rules.

"It appears to me that the way the scheme is set up now is that it doesn't give all landowners equal access to the water," Justice Medina remarked. "It actually seems to discriminate against ranchers or big property owners."

"It does not burden them (big landowners)," Hicks responded. "You have to understand. We are mandated to permit exports and we are mandated to conserve the aquifer. Those are our two mandates, but we are permitted to recognize historic use. That is the legislative permission, and it is dictated that if we permit we then can't turn around and say for export we are doing it differently."

Chief Justice Wallace Jefferson focused on this issue of fairness as well during Johnson's opening statement.

"What you're saying is that a farmer, if he had a transfer permit, he could decide today to stop all farming and transfer out of the district at least 70 percent whereas a rancher, there's no way he'd be able to do that under the district's regulatory scheme."

"That is exactly correct," Johnson responded.

The continuation of his remarks, however, once again focused on use.

"I think it points out the fallacy of the approach. There is no preservation of the historic use in that scenario, in fact, quite the contrary. Use is converted to an entirely new use, and obviously, in this circumstance in particular, there are a limited number of landowners that benefit from the preservation of that historic use," he reminded. "That in essence represents an adjudication of that right for these farmers to make whatever use perpetually of the limited amount of water that the district has found is available within this aquifer."

The chief justice came back to this point later when Hicks was before the court.

"We have a farmer versus a rancher and the farmer can sell it (water) and the rancher can't. That seems to me to be a violation in terms of the equal protection law," Jefferson commented. "It just seems rather unfair."

"It's only unfair if the ability to produce is unfair, if the rules of production are unfair or illegal," Hicks countered.

Hecht interrupted Hicks, saying that the district was putting the cart

before the horse.

"They can't get the water out under your scheme, so they can't produce," Hecht pointed out. "So basically, what it comes down to is they can raise cattle or cantaloupes, and the rancher, he doesn't need as much water, so in a sense he is conserving water by not utilizing it."

Medina then stepped into the fray.

"So let's say I'm not trying to transfer water, I'm trying to get an operating permit, and that depends on the level of the aquifer, which for the conceivable future is probably really not going to let me use that water. Isn't there something wrong with that as well, whereas he (someone with a validation permit) gets a guaranteed amount?"

"There is only something wrong with it if there's something wrong with the very context of being able to protect historic use," Hicks insisted.

The discussion looped back around to this definition of "use" again when Justice O'Neill countered, "Unless we interpret historic use to be a type of use."

"But then you would be ignoring what the statute says," Hicks stressed. "You don't go there. If you interpret it that way you're forcing this district and other districts to treat in-district users differently from exporters. You'll force us to.

"If we had done that, if we (the district) had passed a rule that said what the Guitars said it should be, that all the irrigators — the people that had validation permits — then everyone that had historic use would be saying you can't treat people differently for purposes of export than you treat for purposes of production and you're treating us differently because we have a historic use …"

Again O'Neill refocused on how "use" is defined.

"If it's a new use, all you're asking them to do is apply for an operation permit," she pointed out.

"But it's not a new use because the use is not talking about the kind of use," Hicks reiterated. "You cannot find in the statute any basis for concluding that."

"If there have not been exports before, then why is export not a new use?" she asked.

"Export is not a use. Export is where you're moving water to," Hicks replied. "It doesn't tell you how you're using it …"

There was also discussion about the linking of the validation permit to the right to transfer. Guitar argued that in allowing districts the right to preserve historic use, irrigation for example, the legislature intended that preservation be just for that use and not a conversion to an entirely new use. Transfer should not be permitted as an existing use, Johnson said, and therefore validation permit holders should be required to apply for a

transfer permit and comply with the same rules as all others wishing to transfer water out of the district.

The market and how it was to work also came up a couple of times. There seemed to be some concern about how requiring the irrigators to apply for a transfer permit to export water out of the district would in essence force them to continue to farm to keep from losing their historic rights, and how in the end that might impact the water market.

The appellant's attorney argued that the market would wire around that without any problems.

"The market would still operate. It would just operate fairly because everyone could participate," Johnson insisted. "El Paso would pay those farmers not to farm so that more water would then be available for the district to allocate among all the landowners. They would have to pay enough farmers enough money to free up a sufficient amount of water for export to El Paso."

Justices Nathan Hecht and O'Neill seemed to concur.

"It might be that a farmer might have to decide which was more remunerative — transferring water or retaining it for irrigation," Justice Nathan Hecht commented, "and it might depend on how desperate El Paso was and the price of cantaloupe."

"If transferring water out of the district became more lucrative than farming, then an irrigator could give up the irrigation purpose and apply to the same pool for an operational permit as everyone else," Hecht remarked.

At the tail end there was some discussion about the emphasis the legislature has put on local control specific to the design and implementation of a groundwater district's rules.

"The legislature went to all that trouble to give this authority to a local government. Why shouldn't one leave it to the discretion of the local parties involved?" Justice Medina asked.

"Because this district has exceeded the authority that the legislature granted to Chapter 36 districts, and it's done so in a way that is discriminatory to landowners who have conserved their water rights and who in essence have come up with a scheme where a limited number of landowners benefit from a shared resource," Johnson responded.

Medina also asked how the board members are chosen for these local groundwater districts.

"They are elected," Johnson responded, "but keep in mind that you're talking about a very small population centered around the irrigation community in Dell City. All the board members are farmers."

"That sounds like they have a lock," Medina added. "I would have said that it looks like they could change this by election of board members."

"It's difficult to do," Johnson confirmed.

A ruling is not expected any time soon. In fact, it could be as long as a year before the court issues an opinion.

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