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OPINION COMMITTEE

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RQ-0217-KP

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: *Scope of Guitar Holding Company, L.P. v. Hudspeth County Underground Water Conservation District*, 263 S.W.3d 910 (Tex. 2008).

Dear Attorney General Paxton:

This letter is to request your opinion on what groundwater conservation district rules are permissible in light of the Texas Supreme Court opinion in *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District*.

Chapter 36, Water Code, gives Texas groundwater conservation districts the power to manage and control groundwater production and use. Chapter 36 includes § 36.116(b) ("Regulation of Spacing and Production"), which allows local districts to protect existing wells and production by continuing "historic or existing use" to the extent possible under its comprehensive management plan.

On May 30, 2008, the Texas Supreme Court issued its ruling *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District*, 263 S.W.3d 910 (Tex. 2008), addressing the factors a groundwater conservation district must consider when determining whether a particular use of groundwater qualifies as a "historic or existing use."

Pursuant to § 402.043 Government Code, I respectfully ask that you provide a formal written opinion regarding the following questions:

- 1) **Following the Supreme Court's ruling in *Guitar Holding*, can a "historic or existing use" permit be amended to change the purpose of use or place of use?**
- 2) **Is it permissible to amend a permit for "historic or existing use" to authorize a different purpose of use or place of use but remove the historic use protections for the portion of the permit authorizing a different purpose of use or place of use?**

The answer to this question potentially affects whether the Kinney County Groundwater Conservation District ("KCGCD" or "district") may amend historic or existing use permits issued in Kinney County.

Background/Facts

1. The Texas Supreme Court's Decision in *Guitar Holding*

The issue in *Guitar Holding* stemmed from the City of El Paso's effort to buy and transfer water from nearby Hudspeth County, and whether the conservation district's transfer rules violated state law prohibiting more restrictive conditions on out-of-district transfer applications.¹ As part of its aquifer-conservation plan, the Hudspeth County district imposed restrictions on transferring water based on historical use.² These restrictions meant that users like Guitar, which had not used as much water in the past, could not transfer out as much water as landowners who had a greater historical use.³ Guitar argued the district's restrictions violated Senate Bill 2, a comprehensive groundwater statute enacted in 2001.⁴ The trial court found the conservation district rules valid, and the Eighth Court of Appeals affirmed in part.

The Texas Supreme Court held that the conservation district's more restrictive transfer conditions on new users violated state water law because transfer permit applications were considered a new use for the water.⁵ The Court noted the Legislature added a new definition for "evidence of historic or existing use," which it defined as "evidence that is material and relevant to a determination of the amount of groundwater beneficially used" during the relevant time period.⁶ Furthermore, the Water Code already defined "use and beneficial to the user." Read together, these definitions signified that both the amount of groundwater withdrawn and its purpose were relevant when identifying an existing or historic use to be preserved.⁷ Although there was an existing irrigation use in the district, the transfer rules at issue did not protect that existing use, but instead allowed in-district irrigators to convert their protected existing use to an entirely new use, such as transferring it out of the district for municipal use.⁸ The Court concluded that "[r]ather than protect historic or existing use then, the District's transfer rules, in essence, grant franchises to some landowners to export water while denying that right to others. Because the limitations are not uniformly applied to these new applications and are not necessary to protect existing use, the District's transfer rules exceed the statutory authorization and are thus invalid."⁹

2. KCGCD's Rules Governing Permit Amendments

Pursuant to § 36.101 Water Code, a district may promulgate and enforce rules on groundwater production and use. Below is the district's rule on permit amendments and proposed changes to the process as applied to historic or existing use permits offered in light of *Guitar Holding*.

¹ *Guitar Holding*, 263 S.W.3d at 916.

² *Id.* at 914.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 916.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 918.

A. KCGCD Rule 5.02 (“Permit Amendments”)

Rule 5.02(A) currently reads, in part, as follows:

A permit owner is required to obtain a permit amendment prior to (i) any change in the maximum amount of groundwater to be produced from a well, (ii) the location of a proposed well, (iii) the purpose of use of the groundwater allowed to be pumped under the permit, (iv) the location of use of the groundwater allowed to be pumped under the permit, or (v) the drilling and operation of additional wells even if aggregate withdrawals remain the same.

Rule 5.02 goes on to state in subsection (B) the following:

To bring about an Administrative Permit Amendment, the permit holder must file notice of the contemplated amendment with the District within ninety (90) days from the date of the change in ownership, along with any legal documents establishing the change in ownership. Upon receipt of the requisite notice, the District President or Office Staff, at the District President’s direction, shall, upon determination that the proposed amendment is, in fact, a Ministerial Permit Amendment, grant the permit amendment and issue a revised permit. The District’s issuance of a permit amendment shall be made within thirty (30) calendar days after receipt of the requisite notice and the documentation required.

Finally, subsection (C) addresses changes in purpose of use or place of use:

The scope of any review or hearing on an amendment to change the purpose of use or place of use authorized in the permit is limited to those elements that would have been different if the original permit application had included the provisions in the amendments related to the contemplated new purpose of use or place of use and may subject the permit holder to additional permitting hearings, including contested case hearings, as the Board may deem appropriate and as required by Chapter 36, Water Code.

Thus Rule 5.02 in its current form appears to allow holders of historic or existing use permits to petition the district for an amendment to their permits to change the purpose of use or place of use. With or without a rule change the current statutory provisions—and court interpretations of those provisions—still apply to permit amendments.

B. Proposed Amendments to Rule 5.02

The district is considering the following amendment to Rule 5.02(B) to specifically address amendments to historic and existing use permits:

An Existing Use Permit or Historic Use Permit may not be amended to change the purpose of use of the groundwater to something other than the purpose of use recognized in the Existing Use Permit or Historic Use Permit that was issued to protect the existing or historic activity or investment of the permit holder. No Existing Use Permit or Historic Use Permit

may be amended to allow groundwater to be exported for use outside of the District in conjunction with an Export Permit or otherwise, as export of groundwater out of the District would be a new use. Any Existing Use Permit or Historic Use Permit holder seeking to produce groundwater for a new purpose of use must obtain a Regular Permit in the same manner as other new users.

As amended, Rule 5.02(B) would prohibit changes to the authorized purpose of use of historic or existing use permits. If holders of a historic or existing use permit want to use groundwater for a different purpose, they must apply for a regular permit. The proposed rules do not address whether the applicant may or must reduce their historic or existing use permits as a condition of obtaining a new regular permit.

3. Ongoing Dispute over Amendments to a Historic Use Permit

As the district decides on how to proceed with drafting its proposed rule, a dispute has arisen among county landowners that underscores the lack of consensus on the scope of *Guitar Holding*. The district received an application for an amendment to a historic and existing use permit that currently authorizes production up to 3,100 acre-feet of groundwater annually for agricultural use requesting the permit be modified to allow production of up to 400 acre-feet of groundwater annually for industrial use.

In response to that application, county landowners filed protests against any potential amendment as violating the Texas Water Code. They contend that the language of *Guitar Holding* permanently restricts the authorized use of a historic or existing use permit to its historical purpose of use. The applicant argues in favor of a narrow interpretation of the Court's holding contending that the court only addressed the issue of whether groundwater *transferred out of the district* was a new use requiring a new permit. Accordingly, they argue the scope of the opinion should be limited to new use created by transferring water out of a district and not instructive on change in the purpose of use to an existing historic permit for in-district use. Furthermore, by denying holders of an existing or historic use permit the opportunity to amend their authorized use, the applicant claims that the district would be requiring such holders to "start over" by having them undergo the cumbersome process of applying for a regular permit. This would disadvantage historic or existing use permit holders over their counterparts with regular permits, who could achieve the same result merely by amending their existing permits.

The outcome of this dispute hinges on how the district proceeds to amend Rule 5.02 and whether such amendments conform to the Supreme Court's ruling in *Guitar Holding*, and how they handle the current permit amendment.

Position of Requestor

It is the position of the requestor that the Texas Supreme Court's ruling in *Guitar Holding* prohibits groundwater conservation districts from amending historic or existing use permits to authorize a different use while retaining the historic use protections. Either holders of a historic or existing use permits should, in such circumstances, be required to apply for a regular permit (and may choose to also reduce their historic or existing use permit by a like amount), or amend the

historic and existing use permit to change the purpose of use and remove the historic use protections for that portion of the amended permit. In that latter case, the remaining portion of the permit that continues to operate under its current authorized purpose of use should continue to enjoy protections as a historic or existing use permit.

Argument and Authorities

- The Texas Supreme Court's decision in *Guitar Holding* prohibits groundwater conservation districts from amending the authorized purpose of use of historic or existing use permits while retaining the historic and existing use protections, though the unaltered portions of a permit should not lose the protections.

The primary issue discussed by the Texas Supreme Court in *Guitar Holding* was whether permits granted for historic or existing use could be amended for a new purpose or place of use while retaining their historic and existing use protections. Taking the plain meaning of the words in the statute, the Court held that "use" included both the amount of the permit and the purpose of use when looking at a groundwater conservation district's discretion to preserve historic and existing use. Because transporting water for municipal use differed from the historical use of agricultural irrigation, the Court characterized these permits as "new permits" subject to Section 36.113(e) of the Texas Water Code. Because *all* new uses must receive equal treatment under the statute, and since the district's new rules were not uniformly applied to all new applications, the district misapplied its authority to preserve existing or historic groundwater use within the district.

The language of the opinion clearly indicates that a historic or existing use permit may not be amended to allow a different purpose of use or place of use and remain a historic and existing use permit. Groundwater conservation districts must require landowners to obtain a new (or regular) permit. The current rules for KCGCD raise similar issues presented before the Court in *Guitar Holding*. The amendment proposed by the district squarely addresses these concerns by prohibiting amendments to a historic use permit's purpose of use or place of use. Incorporating this amendment into the district's rules thus achieves compliance with *Guitar Holding's* interpretation of the Texas Water Code.

As an alternative regulatory scheme, parties with a historic or existing use permit seeking only to use a portion of their allocated groundwater for a different purpose should not be forced to abandon altogether status as a historic or existing use permit. Rather, permit holders in such circumstances should surrender the additional protections and pumping authority granted under historic or existing use permits only for the portion of use allocated to the different purpose. Because this is a new use, landowners would be required to demonstrate the absence of any adverse effect of the use on the aquifer, but will not have to do so for portions that still conform to any historic or existing use. This regulatory scheme does not raise the same issues identified in *Guitar Holding*, as the district will not be converting a protected use into a new one, but instead require partial conversion of a permit directed toward a different use while preserving protections granted to remaining portions operating under the previously authorized use.

Conclusion

It appears that the Texas Supreme Court's decision in *Guitar Holding* prohibits groundwater conservation districts from amending historic or existing use permits to authorize a different purpose of use. However, granting portions of a permit that will continue to operate under its current authorized use continued status as a historic or existing use permit runs contrary to the Court's holding. Please note that I will provide further briefing and argument for your consideration of this issue, yet this question is of such critical importance to groundwater regulation in our county I felt it imperative that this request for opinion be submitted as soon as possible.

Respectfully submitted,

A handwritten signature in cursive script that reads "Tracy O. King".

State Representative Tracy O. King,
Chairman
Agriculture and Livestock Committee