



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 26, 2018

The Honorable Tracy O. King
Chair, Committee on Agriculture and Livestock
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0216

Re: Whether a groundwater conservation district may amend a historic or existing use permit in specific circumstances
(RQ-0217-KP)

Dear Representative King:

You ask about a groundwater conservation district's authority to amend a historic or existing use permit in specific circumstances.¹ To provide context for your questions, we begin by reviewing the groundwater permitting scheme in chapter 36 of the Water Code.

Chapter 36 grants a district "broad authority to manage, conserve, and protect groundwater resources through rulemaking and permitting." *Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 912 (Tex. 2008); *see generally* TEX. WATER CODE §§ 36.001–457 (chapter 36). District rulemaking should "protect property rights [and] balance the conservation and development of groundwater to meet the needs of this state." TEX. WATER CODE § 36.0015(b) (stating districts' purpose). To that end, a district may adopt rules that limit groundwater production according to specified criteria. *Id.* § 36.101(a). When a district adopts such limiting rules, it "may preserve historic or existing use² . . . to the maximum extent practicable consistent with the district's management plan" and permitting requirements. *Id.* § 36.116(b); *see also id.* §§ 36.1071 (requiring a district to adopt a groundwater management plan), 36.113 (stating permit requirements).

Districts must require permits for all "drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps," except when statutes provide otherwise. *Id.* § 36.113(a). A district may require a permit or permit amendment application to state "the nature and purpose of the proposed use and the amount of water to be used for each purpose." *Id.* § 36.113(c)(3). Also, a district may prohibit permit holders from changing how they withdraw or use groundwater unless the district approves the change in a permit amendment. *Id.*

¹See Letter from Honorable Tracy O. King, Chair, House Comm. on Agric. & Livestock, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 5, 2018), <https://www.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> ("Request Letter").

²Chapter 36 defines "[e]vidence of historic or existing use" as "evidence that is material and relevant to a determination of the amount of groundwater beneficially used without waste by a permit applicant during the relevant time period set by district rule that regulates groundwater based on historic use." TEX. WATER CODE § 36.001(29).

§ 36.113(a), (c)(3). Section 36.113 authorizes a district to require applicants for new permits to meet more restrictive requirements than holders of a historic use permit if applied uniformly:

The district may impose more restrictive permit conditions on new permit applications and permit amendment applications to increase use by historic users if the limitations:

- (1) apply to all subsequent new permit applications and permit amendment applications to increase use by historic users, regardless of type or location of use;
- (2) bear a reasonable relationship to the existing district management plan; and
- (3) are reasonably necessary to protect existing use.

Id. § 36.113(e).

In *Guitar Holding*, the Texas Supreme Court considered the permissible scope of the exception that a district's rules may make for historic or existing uses. *Guitar Holding*, 263 S.W.3d at 912. The groundwater conservation district in that case granted three types of permits: (1) a validation permit for historic users, (2) a new operating permit, and (3) a permit to transfer water out of the district. *Id.* at 914. The validation permit for historic or existing uses gave the owner the right to produce according to the amount of irrigation that occurred during a prior period but without regard to the applicant's proposed use of water to be produced. *See id.* The rules allowed both historic use permit holders and new operating permit holders to obtain another permit to transfer the water they had a right to produce out of the district, although the holder of a new operating permit had no guarantee of water availability. *Id.* Some owners argued that the statutory requirements for a historic or existing use permit limited the amount of production but did not restrict the proposed use of water to be produced. *Id.* at 915. The Court concluded otherwise, explaining that under the statutes, "[a] district's discretion to preserve historic or existing use is . . . tied both to the amount and purpose of the prior use." *Id.* at 916. The Court decided that under the statutes, when groundwater historically used for irrigation is transferred out of the district, it no longer qualifies for a historic or existing use permit, and the transfer must be treated as a new use subject to the requirements applicable to all new uses. *Id.* at 917–18. Because all new uses must be treated uniformly, the Court concluded that the district rules unlawfully gave preferential transfer rights to holders of historic or existing use permits. *Id.* at 918.

You state that when the Kinney County Groundwater Conservation District proposed new rules for amending historic and existing use permits, various landowners filed responses disagreeing about the scope of the Court's decision in *Guitar Holding*. Request Letter at 4. You inform us that some landowners contend that the opinion "restricts the authorized use of a historic or existing use permit to its historical purpose of use." *Id.* Others argue, you tell us, that *Guitar Holding* concerned only "whether groundwater transferred out of the district was a new use requiring a new permit," and that the opinion does not resolve whether a historic or existing use

permit may be amended to allow other in-district uses provided the historic volume of production remains unchanged. *Id.* (emphasis omitted).

In light of this dispute, you ask: “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?” *Id.* at 1. Although the particular controversy in *Guitar Holding* involved out-of-district transfers, the Court did not limit its holding to those facts. A later opinion by the court reiterated:

In *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*, we rejected the argument that a district’s discretion in preserving “historic or existing use” was limited to the amount of water permitted. Rather, we said,

the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the two might be separated. . . . [B]oth the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to “preserve historic or existing use.” A district’s discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.

Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 836 (Tex. 2012). Thus, under *Guitar Holding*, a change in the purpose of the proposed use of water to be produced under a historic or existing use permit is a new use, even if the new use would occur within the district. *See generally Guitar Holding*, 263 S.W.3d at 912–18. Whether a district must treat an application for an amended permit as an application for a new-use permit will depend on the particular facts and is a matter for the district to determine, in the first instance, subject to judicial review. *See id.* (holding that applications to transfer linked to an existing-use permit were nevertheless applications for a new use); TEX. WATER CODE § 36.113 (stating a district’s authority to approve permits and permit amendments).

You also ask whether it is “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[.]” Request Letter at 1. The answer depends on the kind of amendment or permit that you contemplate. A district has broad regulatory powers within the bounds of its discretion as circumscribed by the statutes. *Guitar Holding*, 263 S.W.3d at 912. Its discretion includes the authority to promulgate “rules limiting groundwater production . . . to provide for conserving, preserving, protecting, and recharging of the groundwater . . . or prevent waste.” TEX. WATER CODE § 36.101(a). A court would likely conclude that a district has sufficient discretion to accept an owner’s surrender of a

portion of the right to produce under a historic or existing use permit, while maintaining protection on the remainder. And a holder could qualify for a new permit for the released portion by meeting the same requirements that any other owner must satisfy to obtain a permit for a new use.

You suggest, however, that you envision a single hybrid application that, while maintaining historic or existing use protections for a portion of the owner's rights to produce, seeks approval of a new use for the remainder. Request Letter at 4-5. A district must apply its new-use requirements uniformly to all requests for new uses, whether the request appears in an application to amend a historic or existing use or in an application for a new use permit. *See Guitar Holding*, 263 S.W.3d at 918. Therefore, a court would likely determine that the uniformity requirements in chapter 36 of the Water Code preclude district rules that would give an advantage to a historic or existing permit holder who seeks new use approval that is not available to other new use permit applicants. *See id.*; TEX. WATER CODE § 36.113(e).

S U M M A R Y

Under the Texas Supreme Court's opinion in *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District No. 1*, a change in the purpose of the proposed use of water to be produced under a historic or existing use permit is a new use, even if the new use would occur within the district. Whether a district must treat an application for an amended permit as an application for a new-use permit will depend on the particular facts and is a matter for the district to determine, in the first instance, subject to judicial review.

A groundwater conservation district may accept a surrender of a portion of rights to groundwater under a historic or existing use permit and allow the holder to retain the remaining rights not surrendered. A holder of a historic or existing use permit who surrenders a portion of rights subject to the permit may seek a new permit for a new use. A court would likely determine that the uniformity requirements in chapter 36 of the Water Code preclude district rules that would give an advantage to a historic or existing permit holder who seeks new use approval that is not available to other new use permit applicants.

Very truly yours,



KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

WILLIAM A. HILL
Assistant Attorney General, Opinion Committee