GUITAR HOLDING: A JUDICIAL RE-WRITE OF CHAPTER 36 OF THE TEXAS WATER CODE?

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I. INTRODUCTION

In 2008, the Texas Supreme Court handed down its decision in *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District No. 1*.[1] The outcome of the water fight in *Guitar Holding* was predicted to have implications all over the West.[2] The decision is significant, not only for the parties involved, but also for every landowner, water law practitioner, water marketer and groundwater conservation district. Groundwater conservation districts are the key contemporary facet of groundwater regulation in Texas, and such regulation in effect balances the landowner-oriented rule of capture with constitutionally mandated legislative conservation measures.[3] In *Guitar Holding*, the Texas Supreme Court surprisingly and inappropriately signaled the potential for judicial intervention in groundwater regulation, and this Note offers both detailed analysis of the opinion, related groundwater regulation in Texas, and comments on possible changes in the groundwater regulatory framework.[4]

In *Guitar Holding*, the Texas Supreme Court faced the issue of "whether one who has been granted the right to produce (withdraw) groundwater from an aquifer underlying a groundwater conservation district is required to surrender that right of production to others depending on

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[1] 263 S.W.3d 910 (Tex. 2008).

[2] Jim Carlton, *Water Fight: A Thirsty El Paso Prompts a Brawl in the Texas Desert*, WALL ST. J., Dec. 9, 2004, at A1. El Paso's former mayor put the price tag on the water rights at issue at over $100 million dollars. *Id.*

[3] *Guitar Holding*, 263 S.W.3d at 912.

[4] *See generally* 263 S.W.3d 910.

whether the water produced is consumed within the district or transferred out of the district."[5] The court ruled that both the purpose of use and amount of use are relevant, and both must be considered when a groundwater conservation district issues a permit preserving historic or existing use.[6] From this determination, the court decided that because no landowners in the district had transferred groundwater outside of the district, the applications for transfer permits were new permits under Section 36.113(e) of the Texas Water Code.[7] In finding the district's rules not in compliance with the court's interpretation of the Texas Water Code, the court held that the groundwater conservation district's rules exceeded the statutory authorization and were thus invalid.[8] In doing so, the Texas Supreme Court substituted its opinion for that of a groundwater conservation district, the Texas Legislature's preferred method of groundwater regulation.[9]

In addition to the substantive outcome, the *Guitar Holding* decision may signal the Texas Supreme Court's willingness to join the water-use regulation arena. Significantly, this is an arena the court seemed intent on leaving to the Texas Legislature until as early as 1999.[10] After all, the Texas Supreme Court has stated, "[w]ater regulation is essentially a legislative function,"[11] and "responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature."[12]

This Note involves a brief discussion of groundwater and groundwater law in Texas (Part II), and analyzes the following: the language from the

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[5] Brief on the Merits for Respondents & Intervenors Named Below at 1, Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910 (Tex. 2008) (No. 06-0904), 2007 WL 1523087.

[6] *Guitar Holding*, 263 S.W.3d at 916 ("A district's discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.").

[7] *Id.* at 917. Section 36.113(e) allows a district to impose more restrictive permit conditions on new permit applications if certain conditions are met. Tex. Water Code Ann. § 36.113(e) (Vernon 2008).

[8] *Guitar Holding*, 263 S.W.3d at 918.

[9] Tex. Water Code Ann. § 36.0015.

[10] *See* Sipriano v. Great Springs Waters of Am., 1 S.W.3d 75, 77 (Tex. 1999). The author believes that the Texas Supreme Court foreshadowed its willingness to enter the water-use regulation arena in its *Sipriano* opinion. *See infra* Part V.

[11] Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 633 (Tex. 1996).

[12] *Sipriano*, 1 S.W.3d at 77 (recognizing the authority granted to the Texas Legislature under Tex. Const. art. XVI, § 59(a)).

Texas Supreme Court's *Sipriano* decision, a previous water law case which perhaps foreshadowed the court's intervention in *Guitar Holding* (Part III); the court's determination that "type or purpose of use" is a factor groundwater conservation districts must consider when issuing groundwater production permits under Section 36.111(b) of the Texas Water Code (subpart V.A); the court's finding that transfer permits in *Guitar Holding* were subsequently new permits under Section 36.113(e) of the Texas Water Code (subpart V.B); and the *Guitar Holding* opinion's effect on certain Texas Water Code provisions (Part VI).

II. GROUNDWATER & GROUNDWATER LAW IN TEXAS

Groundwater is more than just a natural resource; it is a valuable and marketable commodity. Texas groundwater "makes up about fifty-nine percent of the water used by Texans each year and . . . increasingly will be used by cities as population growth in urban areas outpaces rural growth. By 2060, when Texas' population is expected to double to forth-five million people, more groundwater will be used by cities and industry than by agriculture."[13] Yet, over the same time period "the Texas Water Development Board predicts groundwater supplies will decline by thirty-two percent."[14] Thus, as the population of Texas continues to grow, the demands on its water resources are increasing without a corresponding increase in the supply of water.[15]

Along with increasing demand and decreasing supply, "the great diversity of aquifers, hydrologic characteristics, . . . political considerations," and other factors have made regulation of Texas groundwater resources "an extremely complicated and sensitive endeavor. . . ."[16] This endeavor will only become more complicated in the future as cities are forced to search the rural areas for a water supply sufficient to quench the thirst of the their ever-growing populations. The declining supply of Texas groundwater creates a natural conflict between

[13] Texas Alliance of Groundwater Districts, *Groundwater in Texas* 10, http://www.texasgroundwater.org/Groundwater%20in%20Texas%202009.pdf (last visited January 9, 2010).

[14] *Id.*

[15] Tex. S. Subcomm. on the Lease of State Water Rights, Interim Report to the S. Select Comm. on Water Policy, 78th Leg., at 4 (2004).

[16] Texas Alliance of Groundwater Districts, *supra* note 13, at 8.

rural areas and cities, and between landowners and the government.[17]

A. Rule of Capture Governs Groundwater in Texas

Born out of English common law, the rule of capture dates back to as early as 1843, in the case of *Acton v. Blundell*:

> [T]hat the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description damnun absque injuriâ [an injury without a remedy], which cannot become the ground of an action.[18]

The Texas Supreme Court adopted the common-law rule of capture to govern groundwater production in 1904.[19] In adopting the rule of capture, the court explicitly rejected the reasonable use doctrine.[20] The rule of capture allows a landowner to pump as much groundwater as the landowner desires, without incurring liability to neighbors for possible drainage of their wells.[21] Although the court has held firm to the rule of capture since *East*, some exceptions have developed, including the rules adopted by legislatively-backed groundwater conservation districts.[22] The Texas

[17] *See* The Edwards Aquifer Website, Issues Surrounding the Edwards Aquifer, http://www.edwardsaquifer.net/issues.html (last visited Jan. 9, 2010).

[18] (1843) 152 Eng. Rep. 1223, 1235 (Ex. Ch.).

[19] Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 151, 81 S.W. 279, 282 (1904).

[20] *Id.* The reasonable use doctrine limits "the common-law right of a surface owner to take water from a common reservoir by imposing liability on landowners who 'unreasonably' use groundwater to their neighbor's detriment." Sipriano v. Great Springs Waters of Am., 1 S.W.3d 75, 75 (Tex. 1999).

[21] *East*, 98 Tex. at 149–50, 81 S.W. at 280–81. The rule of capture clearly is the law in Texas; however, debate exists as to if and when the rule of capture creates a vested property right in the landowner. *See, e.g.*, Susana Elena Canseco, *Landowners' Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 BAYLOR L. REV. 491, 494 (2008); Dylan Drummond, Lynn Ray Sherman, & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 15 (2004); Marvin W. Jones & Andrew Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of Groundwater*, 61 BAYLOR L. REV. 578, 578 (2009).

[22] *See* Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978)

Supreme Court has reaffirmed that the rule of capture is the law in Texas as recently as 1999 and once again rejected an invitation to adopt the reasonable use doctrine.[23]

B. The "Conservation Amendment" of 1917 Grants the Texas Legislature the Exclusive Duty to Regulate Texas Groundwater

In 1917, Texas citizens enacted Article 16, Section 59 of the Texas Constitution, which is often referred to as the "Conservation Amendment."[24] The amendment provides that: "The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."[25] Significantly, the amendment imposes a duty on the legislature to protect the state's natural resources, including groundwater.[26]

Even before the adoption of the "Conservation Amendment," the Texas Supreme Court anticipated the legislature being involved in groundwater regulation.[27] Accordingly, since the 1917 amendment, the court has expressly recognized the broad powers of the legislature under the amendment,[28] and has reassured the legislature that there is no need "to feel

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(holding that a well owner can be liable for negligently causing subsidence of surrounding land); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292, 276 S.W.2d 798, 800 (1955) (stating that a landowner is prohibited from taking groundwater to maliciously injure a neighbor); *East*, 98 Tex. at 151, 81 S.W. at 281 (stating that groundwater must be put to a beneficial use and not be wasted).

[23] *Sipriano*, 1 S.W.3d at 75. The court cited the 1917 amendment to the Texas Constitution (*e.g.*, the "Conservation Amendment") and the legislature's recent efforts to regulate groundwater (Senate Bill 1) as reasons to uphold the rule of capture. *Id*. at 80.

[24] Tex. Const. art. XVI, § 59(a). Like much water law legislation, the vote came after severe droughts in 1910 and 1917. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 626 (Tex. 1996).

[25] Tex. Const. art. XVI ,§ 59(a).

[26] *Id.*

[27] *East*, 98 Tex. at 149, 81 S.W. at 280 ("In the absence of . . . positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative right in respect to underground waters percolating, oozing, or filtrating though the earth . . . .") (quoting Frazier v. Brown, 12 Ohio St. 294, 311 (Ohio 1861), *overruled by* Cline v. Am. Aggregates Corp., 15 Ohio St.3d 384 (1984)).

[28] *Sipriano*,1 S.W.3d at 78 (noting the legislature's broad power to regulate "even within the common-law tort framework established by the rule of capture").

constrained from taking appropriate steps to protect groundwater."[29]

Pursuant to the objectives of the "Conservation Amendment" and through its power, the Texas Legislature adopted Chapter 36 of the Texas Water Code,[30] in which the legislature delegates its groundwater regulation authority to groundwater conservation districts.[31] The legislature created conservation districts in order to accomplish "the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law."[32] The Texas Supreme Court has approved of the groundwater conservation district approach to groundwater regulation.[33]

C. Groundwater Conservation Districts Are the Texas Legislature's Preferred Method of Groundwater Regulation

The first groundwater conservation district was formed in 1951.[34] Groundwater conservation districts regulate either all or part of 144 counties in Texas.[35] Sixty-five of these districts cover all or part of a single county and thirty of the districts cover more than one county.[36] Districts play an important part in the management, education, conservation, and research of groundwater in Texas.[37]

"Each aquifer is unique, requiring rules that reflect hydrology, geology and climate of that region as well as the economic demands of the

[29] *Id.* at 79.

[30] *Id.*

[31] *Id.*

[32] Tex. Const. art. XVI, § 59(b).

[33] *See Sipriano*, 1 S.W.3d at 80.

[34] Texas Alliance of Groundwater Districts, *supra* note 13, at 13. The first groundwater conservation district was the High Plains Underground Conservation District No. 1. *Id*. The actual authorization to create groundwater conservation districts came two years before. Tex. H. Comm. on Natural Resources, Interim Report: A Report to the H.R., 77th Leg., at 12 (2000).

[35] Texas Alliance of Groundwater Districts, *supra* note 13, at 13. Texas currently has 254 counties. Texas Association of Counties, About Counties, http://www.county.org/counties/ (last visited Jan. 9, 2010).

[36] Texas Alliance of Groundwater Districts, *supra* note 13, at 13.

[37] Tex. H. Comm. on Natural Resources, Interim Report: A Report to the H.R., 77th Leg., at 12 (2000).

community."[38] These factors make state-wide rules for groundwater management both impractical and inefficient.[39] The Texas Legislature acknowledges this reality by permitting groundwater conservation districts to enact "any combination" of the permissible rules limiting groundwater production.[40] Additionally, Section 36.116(e) of the Texas Water Code authorizes conservation districts to enact rules regulating groundwater production based on "a method that is appropriate based on the hydrogeological conditions of the aquifer or aquifers in the district."[41]

Due to the impracticality of having state-wide rules governing groundwater use the Texas Legislature has declared, "[g]roundwater conservation districts . . . are the state's preferred method of groundwater management."[42] The Texas Supreme Court expressly acknowledged and respected the legislature's preference of groundwater conservation districts.[43] Groundwater conservation districts, under authority from the Texas Legislature alter—and in some circumstances abrogate—the rule of capture for areas managed by groundwater conservation districts.[44]

D. "Historic or Existing Use" Is a Legislatively Approved Method of Groundwater Management

One regulatory method commonly used by a groundwater conservation district in issuing water well permits is historic use.[45] The Texas Legislature granted groundwater conservation districts the ability to promulgate rules to "preserve historic or existing use" of groundwater when adopting its rules to limit groundwater production.[46] Some groundwater conservation districts issue permits based on the historic use or existing use whereas other districts simply exempt existing users from any permit requirements.[47] Historic use or existing use permitting is "primarily used

[38] Texas Alliance of Groundwater Districts, *supra* note 13, at 13.

[39] *Id.*

[40] *See* Tex. Water Code Ann. § 36.116(a) (Vernon 2008).

[41] *Id.* § 36.116(e).

[42] *Id.* § 36.0015.

[43] Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 912 (Tex. 2008) (citing Tex. Water Code Ann. § 36.0015).

[44] *See, e.g.*, Tex. Water Code Ann. §§ 36.113, 36.116, 36.119.

[45] *Guitar Holding*, 263 S.W.3d at 913.

[46] Tex. Water Code Ann. § 36.116(b).

[47] Texas Alliance of Groundwater Districts, *supra* note13, at 12.

where supplies are limited and the district chooses to first protect those property owners with investment-backed expectations" for the use of the groundwater.[48] The permitting scheme at issue in *Guitar Holding* was based on historic or existing use.[49]

III. *SIPRIANO* FORESHADOWED THE TEXAS SUPREME COURT'S INTRUSION INTO THE LEGISLATURE'S SPHERE

In *Guitar Holding*, the Texas Supreme Court surprisingly and inappropriately signaled the potential for judicial intervention in groundwater regulation.[50] The Texas Supreme Court's decision to substitute its opinion for that of the legislatively-backed groundwater conservation district is confusing because after the adoption of the "Conservation Amendment" of 1917, the court has consistently and deferentially recognized the Texas Legislature's authority to regulate groundwater.[51] However, the court's decision in *Guitar Holding* may be explained by a Texas Supreme Court water law case that was decided nine years earlier.

In *Sipriano*, the court in its deferral seemed to give a warning to the Texas Legislature.[52] The *Sipriano* opinion is filled with language signaling the court's interest in groundwater regulation.[53] To illustrate, this Part analyzes and highlights the *Sipriano* language that, perhaps, foreshadowed the outcome in *Guitar Holding*.

In *Sipriano*, the court cited "the Legislature's recent actions to improve Texas's groundwater management" as influential in its decision not to abandon the rule of capture and move "into the arena of water-use regulation by judicial fiat."[54] However, in describing its election to stay out of groundwater regulation, the court implied it has the authority to regulate water-use when it refers to its possible move "into the arena" of water-use

[48] Texas Alliance of Groundwater Districts, *supra* note13, at 13.

[49] *Hudspeth County Underground Water Conservation District No. 1* used a historic or existing use permitting scheme. *Guitar Holding*, 263 S.W.3d at 913–14.

[50] *See id.* at 910.

[51] Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 80 (Tex. 1999) (stating that by constitutional amendment, Texas voters made groundwater regulation a duty of the legislature).

[52] *See id.*

[53] *Id.*

[54] *Id.* The recent legislation was Senate Bill 1.

regulation.[55]

Later in the opinion the court again signals that it may begin to regulate water-use, but that "[i]t would be improper for courts to intercede at this time" and that it would be "more prudent to wait and see if Senate Bill 1 will have its desired effect, and to save for another day the determination . . . ."[56]

Even stronger than the majority opinion was the concurring opinion of Justice Hecht and Justice O'Neill:[57] "Actually, such districts are not just the preferred method of groundwater management, they are the only method presently available."[58] The concurring justices seemed not only unsatisfied at recognizing the districts as the preferred method of groundwater management, but also displeased that the districts are the only method of groundwater management.[59]

"Yet in the fifty years since the Legislature first authorized the creation of groundwater conservation districts, the record in this case shows that only some forty-two such districts have been created, covering a small fraction of the State."[60] Thus, "[n]ot much groundwater management is going on."[61] Again, the two justices exhibited their frustration with the pace of both the legislature and groundwater conservation districts, as well as a perceived lack of management of groundwater.[62] The two justices concurring in the *Sipriano* decision all but appeared to place a time limit on their willingness to remain uninvolved: "I concur in the view that, for now—but I think only for now—*East* should not be overruled"[63] because "it would be inappropriate to disrupt the processes created and encouraged by the 1997 legislation before they have had a chance to work."[64]

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[55] *See id.*

[56] *Id.*

[57] Notably, Justice Hecht and Justice O'Neill are the only two justices who took part in the *Sipriano* opinion who still were on the court at the time of the *Guitar Holding* opinion. *See* The Supreme Court of Texas, *Line of Succession of Supreme Court of Texas Justices from 1945*, http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf (last visited Jan. 9, 2010).

[58] *Sipriano*, 1 S.W.3d at 81 (Hecht, J., concurring).

[59] *See id.*

[60] *Id.* (footnote omitted).

[61] *Id.*

[62] *See id.*

[63] *Id.* at 83.

[64] *Id.*

Additionally, it is important to note that in *Sipriano* and other Texas Supreme Court groundwater law decisions preceding the *Guitar Holding* decision, the "Conservation Amendment" has been not only the starting point, but also a focal point for the court.[65] However, in *Guitar Holding*, the court curiously makes no mention of the "Conservation Amendment," which placed the authority to regulate groundwater in the hands of the Texas Legislature and not the Texas courts.[66]

VI. *GUITAR HOLDING* OPINION

A. Facts

Hudspeth County Underground Water Conservation District No. 1 is situated in Hudspeth County, less than one hundred miles east of El Paso.[67] Although an extremely dry part of the state, the district regulates the Bone Springs-Victorio Peak Aquifer which waters the fertile Dell Valley.[68] The district's management of the aquifer began in the 1950s, making it one of the earliest groundwater conservation districts.[69] However, in 2000 the "state auditor deemed the District non-operational, questioning whether it was appropriately managing its groundwater."[70] In 2001, the groundwater conservation district adopted a new management plan seeking to sustain the aquifer at "an historically optimal level by regulating the withdrawal of groundwater."[71] The new plan recognized "three core classes of users: (1) statutorily exempt users, (2) existing and historic users, and (3) new users, which also might include historic users seeking to increase consumption."[72] The new rules "recognize three types of permits: (1) validation permits, (2) operating permits, and (3) transfer permits."[73]

[65] *Barshop v. Media County Underground Water Conservation District* lists the "Conservation Amendment" in the second paragraph of the opinion. 925 S.W.2d 618, 625–26 (Tex. 1996). *Sipriano* discusses the "Conservation Amendment" right after its discussion of the rule of capture adopted in *East*. 1 S.W.3d at 77.

[66] 263 S.W.3d 910, 912–18 (Tex. 2008).

[67] *Id.* at 913.

[68] *Id.*

[69] *Id.*

[70] *Id.* (footnote omitted).

[71] *Id.*

[72] *Id.* at 913–14.

[73] *Id.* at 914.

Wells in operation before adoption of the new rules were typically entitled to validation permits.[74] If not entitled to a validation permit, the landowner may apply for an operation permit.[75] A landowner must have a "validation or operating permit" before they are able "to obtain a transfer permit."[76] Irrigating landowners who obtained a validation permit were entitled to "three to four acre-feet" of water per acre irrigated.[77] Non-irrigating landowners who obtained a validation permit were "entitled to produce the maximum amount of water beneficially used . . . during the period."[78]

One of the largest landowners in Hudspeth County, Guitar Holding Company, "irrigated only a small portion of its land during the designated historic and existing use period" and obtained validation permits for fifteen wells.[79] A group of landowners that irrigated their land during the relevant period also received validation permits.[80] However, since this group of landowners irrigated their land during the relevant period, "they are permitted to produce a significantly greater amount of water than Guitar, even though Guitar owns more land."[81] Guitar brought four separate unsuccessful administrative appeals to the Hudspeth County District Court[82] challenging "the facial validity of the District's new rules regarding production and transfer permits and raised as-applied challenges to the validity of permits issued to" the group of irrigators.[83] The El Paso Court of Appeals upheld the district court's rulings and Guitar appealed to the Texas Supreme Court.[84]

B. The Texas Supreme Court's Holding

The Texas Supreme Court held that both the purpose of use and amount of use are relevant and each must be considered when a groundwater

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 914–15.
[80] *Id.* at 915.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

conservation district issues permits recognizing a historic or existing use.[85] Based on that determination, the court decided that since no landowners in the district had transferred groundwater outside the district, the applications for transfer permits were new permits under Section 36.113(e) of the Texas Water Code.[86] In finding the conservation district's rules not in compliance with the court's interpretation of the Texas Water Code, the court held the district's rules exceeded the statutory authorization and were thus invalid.[87] The following Subparts analyze the court's inclusion of purpose or type of use as a factor for groundwater conservation districts to consider, and the court's determination that the transfer permits in *Guitar Holding* were new permit applications.

V. ANALYSIS OF THE OPINION

A. *The Purpose of the Water Use*

In analyzing the purpose of the water use, the provision at issue is Section 36.116(b) which provides: "In promulgating any rules limiting groundwater production, the district may preserve historic or existing use before the effective date of the rules to the maximum extent practicable consistent with the district's comprehensive management plan under Section 36.1071 and as provided by Section 36.113."[88] The court framed the key to the dispute as the understanding of the word "use."[89] However, as the court pointed out, Chapter 36 has not defined either the word "use" or "historic or existing use."[90] The court relied on a dictionary definition of the word "use," the Chapter 36 definition of "use for a beneficial purpose," and a recent amendment to Chapter 36 to guide its interpretation of "historic or existing use."[91]

According to the court, "'use' ordinarily conveys something with a purpose, an object, or an end."[92] The court found that the definitions of

[85] *Id.* at 916 ("A district's discretion to preserve historic or existing use is accordingly tied to both the amount and purpose of the prior use.").

[86] *Id.* at 917.

[87] *Id.* at 918.

[88] Tex. Water Code Ann. § 36.116(b) (Vernon 2008).

[89] *Guitar Holding*, 263 S.W.3d at 915–16.

[90] *Id.* at 915.

[91] *Id.* at 916.

[92] *Id.* at 916 n.6 (citing THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL

"use for a beneficial purpose" and "evidence of historic or existing use" supported its definition of use.[93] "Use for a beneficial purpose" is defined with a list of specific purposes, and then the all encompassing "any other purpose that is useful and beneficial to the user."[94] "Evidence of historic or existing use" is defined as "evidence that is material and relevant to a determination of the amount of groundwater beneficially used."[95] Reading these definitions together led the court to conclude that both the amount of groundwater withdrawn and the purpose for which it's withdrawn must be considered when recognizing an existing or historic use to be preserved.[96] However, an analysis of the provision at issue, Section 36.116(b), and the other sections it references—as well as the definitions of "beneficial use"—suggest that the type or purpose of use is not a factor the Texas Legislature intended for groundwater conservation districts to consider.

1. Section 36.116(b) and the Other Sections Referenced by Section 36.116(b) Concern the Amount of Groundwater Beneficially Used and Do Not Distinguish Between Particular Beneficial Purposes

It is the author's opinion that the court ignored the plain language of Section 36.116(b) and the other sections specifically referenced by Section 36.116(b). In addition, the court evaluated "use" instead of the term "historic or existing use," which was at the heart of the issue.[97] A review of Section 36.116(b) and the referenced provisions confirm that the Texas Legislature intended "historic or existing use" to refer to the amount of groundwater use and not to encompass any particular purpose of use other than the use beneficial to the user.[98]

Section 36.116(b) deals with a district promulgating its rules, and specifically grants the district the ability to preserve historic or existing

PRINCIPLES 3531 (4th ed. 1993)) (footnote omitted).

[93] *Id.* at 916.

[94] Tex. Water Code Ann. § 36.001(9) (Vernon 2008).

[95] *Id.* § 36.001(29) ("Evidence of historic or existing use" was a recently added definition to Chapter 36).

[96] *Guitar Holding*, 263 S.W.3d at 916.

[97] *See id.*

[98] Section 36.116 deals with the regulation of spacing and production. Tex. Water Code Ann. § 36.116 (Vernon 2008).

use.[99] The provision itself has two significant phrases that deal with "amount of use" and make no sense when read in the context of "type of use."[100] The first phrase states, "any rules limiting groundwater production."[101] Limiting groundwater production speaks directly to the amount of use and not the type of use. The words "limiting" and "production" when used together obviously refer to an amount and not the purpose. The second phrase is, "to the maximum extent practicable."[102] Maximum describes the amount of use and not the purpose of use.[103] Thus, Section 36.116(b) clearly does not anticipate the particular beneficial "purpose of use" as being relevant in the permitting process.

Further, Section 36.116(b) references two other sections, Section 36.1071 and Section 36.113.[104] Section 36.1071 concerns the district's management plan and does not contain anything remotely concerning particular beneficial purpose.[105] However, the section does speak to amount of use.[106] Specifically, Section 36.1071(e) requires the management plan to include estimates of certain quantities such as: "amount of groundwater being used," "annual amount of recharge," and "annual volume of water that discharges from the aquifer."[107] Further, Section 6.1071(f) states, "the district may not adopt any rules limiting the production of wells, except rules requiring that groundwater produced from a well be put to a nonwasteful, beneficial use."[108] In this provision the legislature demonstrates that the particular beneficial purpose is not important. Rather, the use must merely be "a nonwasteful, beneficial use."[109] Reading a "purpose" requirement into Section 36.1071 would make the provision nonsensical as the provision already states that the only purpose of consequence is that it be a "nonwasteful, beneficial use."[110]

[99] *Id.* § 36.116(b).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Webster's Dictionary defines "maximum" as "the greatest quantity or value attainable or attained." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 447 (10th ed. 1998).

[104] Tex. Water Code Ann. § 36.116(b).

[105] *Id.* § 36.1071.

[106] *Id.*

[107] *Id.* § 36.1071(e)(3).

[108] *Id.* § 36.1071(f).

[109] *See id.*

[110] *See id.*

The second provision referenced, Section 36.113, concerns the general permitting of wells.[111] Specifically, Section 36.113(d) mandates that "[b]efore granting or denying a permit or permit amendment, the district shall consider whether . . . the proposed use of water is dedicated to any beneficial use."[112] Again, the legislature does not seem to be concerned with a particular type of beneficial use, but rather that the use is beneficial to the user. Section 36.113(e) allows the district to "impose more restrictive permit conditions on new permit applications and permit amendment applications to increase use by historic users."[113] Applying the court's analysis a person would be able to increase their "type of use." [114] How does one increase their type of use? One does not; one increases amount of use.[115]

Further into Section 36.113, provision 36.113(e) references "permit amendment applications to increase use by historic users, regardless of type or location of use."[116] As the *Guitar Holding* respondent CL Machinery correctly points out in its brief to the court, there cannot be an increased type of use, and neither could there be an increased type of use "regardless of type or location of use."[117] Applying the court's inclusion of "purpose of use" into Chapter 36 would render many of the provisions illogical.[118] In sum, "historic or existing use" in Section 36.116 refers to the amount of groundwater beneficially used and does not distinguish between types or purposes of beneficial use as the Texas Supreme Court held.

[111] *Id.* § 36.113.

[112] *Id.* § 36.113(d).

[113] *Id.* § 36.113(e).

[114] *See* Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 916 (Tex. 2008).

[115] As the respondent CL Machinery pointed out in their brief, "[t]here cannot be an increased type of use, much less an increased type use 'regardless of type or location of use.'" Respondents CL Machinery Co.'s & Cimarron Agricultural, Ltd.'s Brief in Response at 24, *Guitar Holding*, 263 S.W.3d 910 (No. 06-0904), 2007 WL 1523091.

[116] Tex. Water Code Ann. § 36.113(e) (Vernon 2008).

[117] Respondents CL Machinery Co.'s & Cimarron Agricultrual Ltd.'s Brief in Response at 24, Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910 (Tex. 2008) (No. 06-0904), 2007 WL 1523091.

[118] *See* Tex. Water Code Ann. §§ 36.113, 36.116, 36.1071.

2. The Texas Legislature Only Intended to Distinguish Between Beneficial Use and Waste, and Not Between Particular Types of Beneficial Use

"Beneficial use" played an important role in the court's decision that "purpose of use" is a factor that must be considered when a groundwater conservation district issues a groundwater production permit.[119] First, the court in its analysis focuses on Section 36.001(29), which defines "evidence of historic or existing use" as "evidence that is material and relevant to a determination of the amount of groundwater beneficially used without waste."[120] Second, the court focuses on the definition of "use for a beneficial purpose."[121] Since the statute references "beneficial purpose or use," the court determined that this must mean that the legislature intended the specific type or purpose of beneficial use to be relevant.[122] However, there is ample support that the "beneficial use or purpose" intended by the Texas Legislature refers to all uses which are not wasteful, and was not meant to distinguish between particular types or purposes of beneficial use. Support for this contention is found in an analysis of both the common law, which birthed the term "beneficial use," and the statutory utilizations of "beneficial use."[123]

a. Common Law Application of "Beneficial Use"

As the court correctly stated, a basic tenet of statutory construction is that "[t]erms that are not otherwise defined are typically given their ordinary meaning."[124] So where does the phrase "beneficial use" come from? The "beneficial use" the court examined comes from the definition of "evidence of historic or existing use."[125] So the proper analysis should begin with historic use. "Historic use" is a method employed by water districts to protect the reasonable investment expectation of landowners in

[119] *See Guitar Holding*, 263 S.W.3d at 916.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] The author believes that just like under the common law systems that have dealt with water in Texas, under Chapter 36 of the Texas Water Code, generally the only use that is relevant is "beneficial use" and not necessarily any particular use. *See infra* Part V.A.i–iii.

[124] *Guitar Holding*, 263 S.W.3d at 915 (citing Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002)).

[125] Tex. Water Code Ann. § 36.001(29) (Vernon 2008).

their land.[126] The historic use permitting method "is a legislative recognition that substantial investment pre-dated the amendments to Chapter 36 and adoption of rules by local groundwater districts."[127] Thus, recognizing historic or existing use is protecting an investment of landowners that originates prior to the enactment of Chapter 36, a period governed by the common law. Under the common law in Texas there are two different rules of law concerning rights to water. The doctrine of prior appropriation deals with surface water, while the rule of capture governs groundwater.[128] Neither of these two common law systems differentiated between types of beneficial use.

Under the prior appropriation doctrine, courts only differentiated between beneficial use and waste: "[T]he right which one obtains by a water permit for appropriated waters is a right which is limited to beneficial and non-wasteful uses."[129] The type or purpose of use was not relevant so long as the use was a non-wasteful, beneficial use.[130]

The rule of capture does not distinguish between types of use other than the use must be a beneficial one as opposed to wasteful. Beneficial use is the "the basis, the measure and the limit to the right to use the waters of the State."[131] In *City of Corpus Christi v. City of Pleasanton*, the court stated that:

> [U]nder the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off the land and outside of the basin where produced, just as he could sell

[126] Mayhew v. Town of Sunnyvale, 964 S.W.2d, 922, 937 (Tex. 1998).

[127] Brief on Merits for Respondents & Interveners Named Below at 4, Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 916 (Tex. 2008). (No. 06-0904), 2007 WL 1523087. The investment in groundwater comes from the drilling and operating of a well as well as the investment in activities that directly rely on that water. *See id.* at 5.

[128] Rules concerning surface water are inapplicable to groundwater law; however, "beneficial use" is a term used with both surface water and groundwater under the common law in Texas. Tex. Water Rights Comm'n v. L.A. Wright, 464 S.W.2d 642, 647 (Tex. 1971); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 294, 276 S.W.2d 798, 802 (Tex. 1955).

[129] *L.A. Wright*, 464 S.W.2d at 647.

[130] *Id.*

[131] H.J. OF TEX., 33rd Leg., R.S. 953 (1913).

any other species of property.[132]

It follows that a "[l]andowner owns . . . percolating water under his land and that he can make a non-wasteful use thereof."[133] The "appropriate conclusion is that" the only differentiation among uses of groundwater "is that a landowner is not allowed to waste groundwater."[134]

b. The Legislature's Utilization of "Beneficial Use" in the Texas Water Code Is Identical to "Beneficial Use" Under the Common Law

The "beneficial use" appearing in provisions of the Texas Water Code is identical to the common law application of "beneficial use." For example, the Texas Water Code defines waste in terms of beneficial use: "Waste means . . . the flowing or producing of wells from a groundwater reservoir if the water produced is not used for a beneficial purpose."[135] The absence of a distinction between types of beneficial uses is also present in the definition that the court utilized.[136] Section 36.001(29), states "[e]vidence of historic or existing use" means "evidence that is material and relevant to a determination of the amount of groundwater beneficially used without waste."[137] Further, "[u]se for a beneficial purpose" is defined by listing such broad uses as "agricultural," "gardening," "domestic" and then providing the catch-all "any other purpose that is useful and beneficial to the user."[138] Thus, the "beneficial use" utilized in Chapter 36 of the Texas Water Code makes no distinction among different beneficial uses of groundwater, nor any distinction between local use and transport of groundwater, but only between beneficial use and waste.

[132] *City of Pleasanton*, 154 Tex. at 294, 276 S.W.2d at 802.

[133] Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

[134] Tex. S. Interim Comm. on Natural Resources, Interim Report: Tex. Groundwater Resources, 77th Leg., at 51 (2000).

[135] Tex. Water Code Ann. § 36.001(8)(B) (Vernon 2008).

[136] Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 916 (Tex. 2008).

[137] Tex. Water Code Ann. § 36.001(29).

[138] *Id.* § 36.001(9).

c. A Comparison of Chapters 36 and 11 of the Texas Water Code Reveals the Legislature Did Not Intend Type of Beneficial Use to Be an Element Considered by Groundwater Conservation Districts

Further support for the contention that the Texas Legislature did not intend "beneficial use" in Chapter 36 to differentiate between types of non-wasteful uses is found in an analysis of Section11.085 of the Texas Water Code, which governs interbasin transfers of surface water.[139] The legislature permits the Texas Commission on Environmental Quality, in weighing the proposed transfer, to consider among other things "the amount and purposes of use."[140] However, the purpose language is not found in Chapter 36 when dealing with groundwater transfers,[141] and it is presumed that the legislature knew or was familiar with existing statutes.[142] Thus, the legislature by not including type or purpose of use as a consideration for a transfer permit in Chapter 36, has expressed its intent that type or purpose of use not be considered when dealing with groundwater transfers.

B. The Transfer Permits Are from New Permit Applications

In the second part of the *Guitar Holding* opinion, the Texas Supreme Court reasoned that because no landowner had ever transferred water outside the district or obtained a permit to do so—and because a landowner must have a permit to transfer water outside of the district—all of the transfer permits were new permits within the meaning of Section 36.113(e).[143] However, by its own terms, for Section 36.113(e) to apply, the transfer permit must be either a new permit or a permit amendment application to increase use.[144] While the court's application of Section

[139] *See* Tex. Water Code Ann. § 11.085 (Vernon 2008 & Supp. 2009). Surface water law, and specifically Chapter 11, is not applicable to groundwater law, but the author is pointing out the differences.

[140] *Id.* § 11.085(k)(2)(B).

[141] The court correctly pointed out that Section 36.1131 does include amount and purpose as recommended elements for well permits. *Guitar Holding*, 263 S.W.3d at 916. However, Section 36.1131 specifically deals with the initial permitting process and does not apply to transfers. *See* Tex. Water Code Ann. § 36.1131.

[142] Spence v. Fenchler, 107 Tex. 443, 466, 180 S.W. 597, 605 (Tex. 1915).

[143] Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 917 (Tex. 2008).

[144] Tex. Water Code Ann. §36.113(e)(1).

36.113(e) is correct, the following subpart of this Note demonstrates that Section 36.113 is inapplicable to the transfer permits in *Guitar Holding* because the irrigators were neither new users nor historic users increasing use.

1. Harmonization of Sections 36.113 and 36.122 of the Texas Water Code

Section 36.113 deals with permit applications,[145] whereas Section 36.122 deals with out-of-district groundwater transfers.[146] Section 36.122(a) specifically references Section 36.113: "If an application for a permit or an amendment to a permit under Section 36.113 proposes the transfer of groundwater outside of a district's boundaries, the district may also consider the provisions of this section in determining whether to grant or deny the permit or permit amendment."[147] Section 36.122(c) provides that except for Section 36.113(e), "the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users."[148] Section 36.113(e) allows a district to "impose more restrictive permit conditions on new permit applications and permit amendment applications to increase use by historic users" if the limitations "apply to all subsequent new permit applications and permit amendment applications to increase use by historic users, regardless of type or location of use."[149]

Analyzing Sections 36.113(e) and 36.122(a) together, as the legislature intended by linking the provisions, establishes that a district is able to impose additional restrictions on two types of users: new users and historic users who seek to increase the amount of groundwater they consume.[150] The respondents in *Guitar Holding* were neither historic users seeking to increase the amount of groundwater used, nor were they new users.[151] The respondent irrigators were historic users who wished to transfer

[145] *Id.* § 36.113.

[146] *Id.* § 36.122.

[147] *Id.* § 36.122(a).

[148] *Id.* § 36.122(c).

[149] *Id.* § 36.113(e).

[150] *See id.* §§ 36.113(e), 36.122(a).

[151] Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 917 (Tex. 2008). Guitar Holding Company challenged the district's permitting scheme before the respondents attempted to transfer water out of the district. *Id.*

groundwater out of the district and not historic users seeking to increase the amount of groundwater used.[152]

Additionally, the irrigators could not have been new users under the district's rules because an applicant cannot obtain a transfer permit without first having either a validation permit or an operating permit.[153] Under the district's rules the amount of water to be transferred was directly linked to the amount permitted by the validation or operating permit.[154] Neither the legislature nor the district established transfer permits independent from production-based permits but instead linked them.[155] First and foremost, a water transferor needs a permit to produce groundwater.[156] An illustration of Section 36.122(c) permit conditions placed on transferors and existing in-district users supports this assertion. Transferors must have both a production permit and a permit to transfer the water out of the district.[157] By itself the transfer permit gives no right to produce water.[158]

The district had the statutory authority to adopt rules providing for the validation and operating permits.[159] Validation and operating permits are the only production-based permits of groundwater that the district allowed.[160] Under Section 36.122, the district could not prevent the permit holder from transferring water outside the district if the permit holder so chose.[161] The district's transfer rules mirrored the system set up in the Texas Water Code because groundwater conservation districts are legislatively mandated not to impose more restrictive conditions on transferors.[162] The district was unable to enforce stricter standards on the respondent irrigators and neither should the court. The court's holding that the transfer permits are from new permit applications goes directly against the legislature's apparent prioritization of water marketing and related

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[152] *Id.*

[153] Hudspeth County Underground Water Conservation District No. 1, Rule 6.13(c).

[154] *Id.* Rule 3.7.

[155] *See id.* Rule 6.13(c); Tex. Water Code Ann. §§ 36.122, 36.113.

[156] Tex. Water Code Ann. § 36.113(a).

[157] *See* Hudspeth County Underground Water Conservation District No. 1, Rule 6.13(a)(c).

[158] *See id.* Rule 6.10(a), 6.13(c).

[159] Tex. Water Code Ann. § 36.113.

[160] Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 914 (Tex. 2008). Exempt users, such as the petitioner and other ranchers, existed. *Id.*

[161] Tex. Water Code Ann. § 36.122(g).

[162] *Guitar*, 263 S.W.3d at 913 n.4.

transfers by placing more restrictive conditions on transferors.

2. Senate Bill 2 Is Evidence of Legislative Support for Water Transfers

When the Texas Legislature adopted Senate Bill 2 in 2001, it eased the previously rigid requirements on out-of-district water transfers.[163] Prior law had expressly authorized districts to limit and prohibit groundwater exports.[164] Senate Bill 2 enacted the above described Section 36.122(c), which mandates that a district cannot discriminate against a permit applicant or permit amendment applicant merely because the applicant seeks to transfer groundwater.[165]

The amendment to Section 36.122 removed two significant impediments to water marketers.[166] Section 36.122 previously required a district to consider the amount and purposes of use in the proposed receiving area for which water is needed and the availability of feasible and practicable alternative supplies to the applicant.[167] "Perhaps the most fundamental changes contained in SB 2 are amendments to Section 36.122" which "establish the framework within which proposed water transfers may be objectively analyzed."[168] By eliminating purpose of use from a district's consideration of a transfer permit, the Texas Legislature in Senate Bill 2 expressed its prioritization stance on water transfers.

Hudspeth County Underground Water Conservation District No. 1 adopted rules consistent with Senate Bill 2, allowing the holders of production-based validation and operating permits to transfer their permitted water out of the district.[169] Did the Texas Supreme Court

[163] *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 2.52, 2001 Tex. Gen. Laws 1880, 1906–07 (codified at Tex. Water Code Ann. § 36.122(c)).

[164] *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 2.49, 2.52, 2001 Tex. Gen. Laws 1880, 1903–04, 1906–07 (codified at Tex. Water Code Ann. §§ 36.113(e), 36.122(c)).

[165] *Id.*

[166] Tex. Water Code Ann. § 36.122; *see also* Tex. S. Interim Comm. on Natural Resources, Interim Report: Tex. Groundwater Resources, 77th Leg., at 44–45, 69, 72–73 (2000); Tex. H. Comm. on Natural Resources, Interim Report: A Report to the H.R., 77th Leg., at 26 (2000).

[167] *See* Tex. S. Interim Comm. on Natural Resources, Interim Report: Tex. Groundwater Resources, 77th Leg., at 44–45, 69, 72–73 (2000); Tex. H. Comm. on Natural Resources, Interim Report: A Report to the H.R., 77th Leg., at 26 (2000).

[168] Tex. Joint Comm. on Water Resources, Interim Report: A Report to the Tex. Leg., 78th Leg., at 42 (2002).

[169] Hudspeth County Underground Water Conservation District No. 1, Rule 6.13.

judicially rewrite Section 36.122 by making purpose or type of use a factor for the district to consider despite the Texas Legislature clearly removing it?[170] Yes. By considering transfers as new permits, the court has forced Hudspeth County Underground Water Conservation District No. 1 to impose "more restrictive permit conditions on transporters than the district imposes on existing in-district users."[171]

VI. THE *GUITAR HOLDING* DECISION'S EFFECT ON CERTAIN TEXAS WATER CODE PROVISIONS

After the court's opinion, in the author's estimation, Chapter 36 should read much differently. The following subpart outlines three important sections of the Texas Water Code involving the permitting process and provides a comparison between these sections and the author's reading of these sections after the court's analysis and interpretation in *Guitar Holding*. The bracketed portions in the right hand column represent the additions needed to read the sections under the Texas Supreme Court's analysis.

First, is Section 36.116(b) which deals with permitting historic or existing use.[172]

§ 36.116	§ 36.116 post-*Guitar Holding*
In promulgating any rules limiting groundwater production, the district may preserve historic or existing use before the effective date of the rules to the maximum extent practicable consistent with the district's comprehensive management plan under Section 36.1071 and as provided by Section 36.113**.**	In promulgating any rules limiting groundwater production, the district may preserve [the exact same] historic or existing use [as was previously permitted and for the exact same purpose as previously permitted,] consistent with the district's comprehensive management plan under Section 36.1071 and as provided by Section 36.113.

[170] Guitar Holding Co., v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 916 (Tex. 2008).

[171] Tex. Water Code Ann. § 36.122(c).

[172] Tex. Water Code Ann. § 36.116(b).

The additions in the right column now take into consideration not only amount of use, but also the type or purpose of beneficial use that the court stated was a necessary consideration for district's in permitting historic or existing use.[173]

Next, is Section 36.113(e), which allows a district to impose additional permit restrictions on certain types of users or applicants.[174]

§ 36.113(e)	§ 36.113(e) post-*Guitar Holding*
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 . . .	The district may impose more restrictive permit conditions on new permit applications and permit amendment applications to increase use by historic users [and all changes in type or purpose of use by historic users] if the limitations . . .

The right column accounts for the Texas Supreme Court's inclusion of type or purpose of use as a factor for a groundwater conservation district to consider when issuing permits and the court's determination that a change in use constitutes a new permit.[175]

Lastly, is Section 36.122(c), which restricts groundwater conservation districts from imposing more restrictive conditions on water transporters.[176]

§ 36.122(c)	§ 36.122(c) post-*Guitar Holding*
Except as provided in Section 36.113(e), the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users	Except as provided in Section 36.113(e), the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users [unless an existing in-district user chooses to transfer groundwater outside of the district]

[173] *See infra* Part V.A.
[174] Tex. Water Code Ann. § 36.113(e).
[175] *See infra* Part V.A–B.
[176] Tex. Water Code Ann. § 36.122(c).

The Texas Water Code section now can be read to allow a district to impose more restrictive conditions on historic or existing users who elect to transfer water out of the district.[177]

Under the court's analysis, since all the validation and operating permits are issued, a validation or operating permit holder in the district would in effect be forced to give up its permit should the permit holder choose to transfer water.[178] Why? Because all of the groundwater rights available in the district had been allotted and under the court's reasoning, the transfer permits are considered new permits.[179] This effectively places the planned transferors at the end of the permit line. The court's interpretation goes directly against the intent of the Texas Legislature in Senate Bill 2, to encourage transfers of water out of a local district. The legislature, under its constitutional mandate, delegated its authority to groundwater conservation districts to allow for rules that best fit each aquifer, climate, geographic region, and the citizens most affected.[180] The court, in *Guitar Holding*, substituted its judgment for that of a groundwater conservation district. In doing so, the Texas Supreme Court entered the water-use regulation arena, which is constitutionally reserved to the Texas Legislature.

VII. CONCLUSION: *GUITAR HOLDING* FORESHADOWS POSSIBLE FURTHER COURT ACTION

"The clash between the property rights of landowners in the water beneath their land and the right of the State to regulate water for the benefit of all is more than a century old."[181] To date, practitioners, landowners, and groundwater conservation districts have believed the "Conservation Amendment" left regulation of the clash to the Texas Legislature. Does *Guitar Holding* signal that the Texas Supreme Court is ready to take control over this fight? If so, the shift in control could have serious implications to

177 *See infra* Part V.B.

178 Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 917 (Tex. 2008).

179 *Id.*

180 Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 80 (Tex. 1999).

181 Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 623 (Tex. 1996).

landowners, practitioners and groundwater conservation districts. Currently, there are numerous important issues directly impacting the status of Texas groundwater. One important issue is if and when the rule of capture creates a vested property right in the landowner,[182] although the Texas Supreme Court appears to have ducked the issue by its refusal to hear *City of Del Rio v. Clayton Sam Colt Hamilton Trust*.[183] Another important issue in groundwater law concerns the controversial opinion by the Eastland Court of Appeals dealing with whether a city is subject to a groundwater conservation district's regulations.[184] Considering the increasing tension between landowners and the government, caused by the declining supply of Texas groundwater, there are sure to be many important water law cases making their way through the Texas court system over the next decade. Perhaps the *Guitar Holding* opinion foreshadows that the Texas Supreme Court is willing to take a more active role in groundwater-use regulation, which could significantly impact an already volatile area of the law.

[182] *Compare generally* Jones & Little, *supra* note 21, *and* Drummond, Sherman & McCarthy, *supra* note 21, *with* Canseco, *supra* note 21. Additionally, *compare generally* City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied) (not dealing with a groundwater conservation district), *and* Edward Aquifer Authority v. Day, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. granted) (dealing with a groundwater conservation district), *with* City of San Marcos v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied) (holding the rule of capture means the property interest in groundwater does not vest as a property right until the groundwater actually is captured).

[183] 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied) (rehearing overruled Aug. 19, 2008, pet. denied Sept. 23, 2009, and rehearing of pet. for review denied Dec. 11, 2009) (not dealing with a groundwater conservation district).

[184] City of Aspermont v. Rolling Plains Groundwater Conservation Dist., 258 S.W.3d 231, 233 (Tex. App.—Eastland 2008, pet. filed).