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Supreme Court of Texas.
GUITAR HOLDING COMPANY, L.P., Appellant/Cross-Appellee,
v.
HUDSPETH COUNTY UNDERGROUND WATER CONSERVATION DISTRICT NO. 1,
Appellee/Cross-
Appellant, v. CL Machinery Company and Cimarron Agricultural, Ltd.,
Appellees.
No. 06-0904.

December 5, 2007

Appearances:
Russell S. Johnson, McGinnis, Lochridge & Kilgore, LLP, Austin,
TX, for petitioner.
Max Renea Hicks, Attorney at Law, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet
O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W.
Green, Phil Johnson, Don R. Willett.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated please. The Court is ready to hear argument in 06-0904, Guitar Holdings Company v. Hudspeth County Underground Water Conservation District No. 1. [Guitar Holding Co., L.P. v. Hudspeth County Underground Water --- S.W.3d ----, 2008 WL 2223209, Tex.,2008].

MARSHAL: May it please the Court. Mr. Johnson will present argument for the petitioner. Petitioner has reserved seven minutes for rebuttal.

ORAL ARGUMENT OF RUSSELL S. JOHNSON ON BEHALF OF THE PETITIONER

MR. JOHNSON: May it please the Court. This case presents the question of whether a Chapter 36 Groundwater District can under the limited authority granted under Chapter 36 to preserve historic use.

JUSTICE MEDINA: What is the definition of 'use'? How do we use that term?

MR. JOHNSON: In this case --

JUSTICE MEDINA: The definition of 'is' is -- [Laughter]

MR. JOHNSON: 'Use' is used throughout Chapter 36 in the context of both the type and the amount of use. So I think, the answer is it

addresses the question of type character of use. So 'use' means to what use do you put the -- the water.

JUSTICE MEDINA: What about historical use?

MR. JOHNSON: In historic use, I think, has this specific definition of preserving the status quo. The legislature intended in 36.116(b) to give these groundwater districts that have this new extensive regulatory authority the power to exempt, if you will, existing or historic use from the application of these new regulations.

JUSTICE MEDINA: How does historic use apply in the Senate Bill 2 under contemplating a different type of use in transporting the water out of the district?

MR. JOHNSON: Clearly, what the legislature intended was that when you put 'use' to a new use, you would have to comply with the new regulations of the groundwater district. In fact, they made that abundantly clear, I think, in 36.113(e) where they say in essence recognizing the groundwater districts statewide would be adapting new rules with new regulatory powers that were granted in Senate Bill 2, recognized that -- that there would be a special class if you will of protected historic use that would have then if it shows to change its use or change the character of the use -- of the protected use would be subject to the same rules as any other user in the district would have to comply with.

JUSTICE O'NEILL: How long do these transfer permits last [inaudible]?

MR. JOHNSON: The -- the transfer permits are issued for a three-year term pending construction of the facilities and then, are good for a 30-year term.

JUSTICE O'NEILL: Okay. So, what if, an irrigator decided to transfer a portion of the water, could they then decide 2 years later that they need it for irrigation purposes and get it back?

MR. JOHNSON: Under the district's rules they have authorized the irrigator to make a determination annually as to whether or not they would transfer their water under the authorization of their transfer permit.

JUSTICE O'NEILL: So, if -- if your scheme were to carry the day, if the -- if -- if the water was not transferred -- if the water was not used in the district to irrigate, then what would happen? How it would be allocated?

MR. JOHNSON: If they were put to a new use --

JUSTICE O'NEILL: Yes.

MR. JOHNSON: -- just like any other landowner in the district, that would be subject to the district's rules requiring the obtaining of an operating permit so which is a virtually useless permit for purposes of commercial development of the water or transfer.

JUSTICE O'NEILL: So if -- if an irrigator wanted to transfer out you would require them to get an operating permit to do that as a new use.

MR. JOHNSON: That would be a new use under the -- under the statute and therefore would be required to comply with the district's rules that apply to all new use.

JUSTICE O'NEILL: And if that happened, then isn't it an irrigator to keep from giving up the rights that they already have than to just continue to use it for irrigation purposes.

MR. JOHNSON: And that's exactly what the legislature intended, was to authorize those users that have made an investment that an undertaking an activity prior to the overlay of this regulation, to be allowed to continue to do that. That was the intent of the legislature

in 36.113 and in 36.116. So, yes, they are confined to that use, which is protected in this special category because it is not subject to the overlay of the otherwise regulatory scheme adopted by the district. So, really what the legislature attempted to do in Senate Bill 1, and Senate Bill 2, and -- and finally in Senate Bill 3 was to empower groundwater districts to for the first time legitimately manage and protect the groundwater resources of the State. But the legislature recognized that there was a lot of groundwater use that predated the empowerment of these groundwater districts, so it made special provision for the protection of only that historic use. And they used the word preserve, which I think is extremely instructive in terms of what the legislature intended. Preserve means to maintain the status quo.

CHIEF JUSTICE JEFFERSON: You say in your brief that several times that there was never a transfer out of the district.

MR. JOHNSON: That is correct.

CHIEF JUSTICE JEFFERSON: It seems that -- is just-- it seems surprising. So that only occurred after the transfer permits were put in place.

MR. JOHNSON: Exactly correct. The -- the local use had been for irrigation purposes in Dell City, which is quite some distance from the market that -- that this water would be put to. So, yes, the use was all local. There had never been a transfer of this water outside of the district.

JUSTICE O'NEILL: Well, in fact, transfer out of the district was prohibited. Isn't that right under the old rules?

MR. JOHNSON: Your Honor, you're correct. In Senate Bill 1 there was a provision added to Chapter 36 that gave groundwater districts the power to prohibit exports. And this district did have rules that would prohibit exports. That was changed in Senate Bill 2 in 2001 and specifically the groundwater districts were prohibited from prohibiting exports, but they were given some power to regulate exports and transfers.

CHIEF JUSTICE JEFFERSON: One question of clarification. The district says that and I quote, trial counsel for Guitar Holding that you told the trial court that we are not challenging constitutionality of Chapter 36. Is that --

MR. JOHNSON: That --

CHIEF JUSTICE JEFFERSON: -- correct then and is it correct now?

MR. JOHNSON: It is correct then and it is correct now. And let me -- I think it's important to recognize what this case is not about. This case is not challenging the authority of the legislature to adapt the provisions of Chapter 36 in any way, shape, or form nor does this case impugn the authority of the district to protect historic use, to preserve and protect the historic use. This case is not about undoing the groundwater regulatory framework that the legislature has provided in Senate Bill 1, Senate Bill 2, and Senate Bill 3. In fact, it is the exact opposite. This case represents an opportunity for the Court to advise groundwater districts of the extent of the authority but the limits on that authority, and in this case the specific limit upon that authority to protect or preserve historic use. In the absence of that limitation, the -- the preservation or protection of historic use, which was intended to grandfather or exempt from regulation of these preexisting uses before the -- those uses would then be the predominant or perhaps only use in the district, which would be the exact opposite of what the legislature intended. What the legislature intended was to give all landowners equal access to the water for new uses but to

preserve the special category of historic use.

JUSTICE MEDINA: Well, it appears to me that the way the scheme is set up now it doesn't give all landowners equal access to the water, but actually it seems to discriminate against the ranch owners or big property owners.

MR. JOHNSON: It does. And that's why we are here before the Court. These rules discriminate against the ranchers who have conserved their waters.

JUSTICE MEDINA: Well the next -- I think you confused me where you said you're not challenging the constitutionality of that because if you apply the rational basis to us, then perhaps is what the municipality did is -- what the district did is irrational and that it's trying to adhere to what the statute says.

MR. JOHNSON: What we are challenging constitutionally is the --the exercise of the authority, the limited authority granted by Chapter 36 by this particular district. We do not --

JUSTICE MEDINA: But your response to the Chief was that you're not challenging the constitutionality of any provision --

MR. JOHNSON: -- Chapter 36. What is -- what violates the equal protection clause is the specific provisions allowing the conversion of this preserved historic use to the new use of transfer when every other new user is treated different. So that's the distinction. This is not a challenge to Chapter 36. This is not a challenge to groundwater district's authority to protect and preserve historic use in a category different from all new users that are subject now to the regulatory frame.

CHIEF JUSTICE JEFFERSON: What you're saying is that a farmer could -- could decide today if they get this transfer permit to stop all farming on the -- on the property and transfer water out of the district or at least 70 percent under the permit. Whereas, a rancher, there's no way that they would be able to do that under the district's regulatory scheme.

MR. JOHNSON: That is exactly correct. And it --and it -- and I think it points out the fallacy of the -- of the approach. There is no preservation of the historic use in that scenario. In fact quite the contrary, the use is converted to an entirely new use. And obviously in this circumstance in particular, there is a limited number of landowners that benefit from the preservation of that historic use. And the way these rules operate, that, in essence, represents an adjudication of that right for these -- these farmers to make whatever use perpetually of the limited amount of water that the district has found is available within this article, which is what --

JUSTICE HECHT: Is it -- is it clear in Senate Bill 2 that one thing the legislature is trying to achieve is unfettered transfer of water out of locations where it can be pumped?

MR. JOHNSON: Clearly, the legislature had a market in mind as to the structure of the provision of Senate Bill 2. And it --it intended to limit groundwater district's ability to treat transfers for use outside of the district differently than uses inside the district.

JUSTICE HECHT: So irrigators argue in their brief that if they have to choose between giving up rights to water to get transfer rights or holding what they have or just hold what the have and continue to raise produce.

MR. JOHNSON: And that would be appropriate and --and sanctioned by Chapter 36. That is exactly what the outcome would be.

JUSTICE HECHT: But that would defeat the legislative intent that water be transferred out, at least that it would be freer to do.

MR. JOHNSON: There's a balance to be struck between preserving the historic use and overlaying regulation on the groundwater district. And I think clearly the legislature did not want groundwater districts to be in a position where there was overuse or there was a failure of that protection. So, perhaps there would be a limit on the ability of these farmers to market their right, but it would not interfere with the operation of the market in -- in any way other than limiting the available water as the district had found was available for new use or transfer.

JUSTICE HECHT: I suppose it might not be all or nothing. It might be that a farmer would have to decide which was more remunerative -- transferring water or at least some water or retaining it for irrigation or it would depend on how desperate El Paso was and what the price of cantaloupes are in this case

MR. JOHNSON: And I think the amicus brief for the farm bureau points out that that's exactly the case, that they will have a market position because they are a preserved use. And the way these rules operate, they'll have -- they'll have value in the context of the market. But -- but practically speaking, the -- the preservation that is intended by the legislature is just for that use, not a conversion to an entirely new use.

JUSTICE O'NEILL: So under your interpretation, that the aquifer is 3580 or below then no water gets transferred out of the district.

MR. JOHNSON: That is what the rules provide. That's correct. And as a practical matter, as the record reflects, that does not happen.

JUSTICE O'NEILL: But otherwise, if -- if the irrigators are able to transfer out, they're guaranteed to transfer out 3,000 acre feet?

MR. JOHNSON: Three acre feet per irrigated acre is the base.

JUSTICE O'NEILL: Irrespective of the level of offer.

MR. JOHNSON: Exactly correct. So, they have -- they have assured, permanent, guaranteed right, which has value in the marketplace. So, it creates a distinct difference between the parties. My time is up.

JUSTICE: Further questions?

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court is ready to hear arguments from the respondent.

MARSHAL: May it please the Court. Mr. Hicks will present argument for the respondent

ORAL ARGUMENT OF MAX RENEA HICKS ON BEHALF OF THE RESPONDENT

MAX RENEA HICKS: May it please the Court. As Justice Medina, I think noted subtly or not, notwithstanding what Guitar has said, what they're doing here is really challenging the structure that's set up in Chapter 36 by the legislature. This case really when you look behind what I consider to be an impenetrable statutory argument. When you look behind it, this case really asks the Court whether it meant what it said in 1999 in Sipriano [Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75 (Tex. 1999)].

JUSTICE O'NEILL: Let me -- let me just ask a quick question to follow up on my last question.

MR. HICKS: Sure.

JUSTICE O'NEILL: Under Guitar's interpretation, if the aquifer 3580 or below no water goes out of the district. Under your interpretation, water does go out of the district because the

irrigators are given a right to transfer it if the aquifer's at a lower level. And how does that preserve the aquifer as this is the intent of the Water Code?

MR. HICKS: Well, our interpretation I believe is the correct one. It's -- it's the right to produce is the first step in export. I mean is -- it's just physics, or chemistry, or something. It's -- it's reality. You have to produce the water before you can send it out. You can't send it out till you produce the water. And our rules follow -- I'm -- I'm coming around to the direct answer to your question. Our rules follow Chapter 36 precisely in terms of the permission it gave us, that we can recognize historic use. We did that. 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 --and used it, it doesn't matter how -- it just so happens here, it's mainly agricultural irrigation. If you used it during that period, you get a permit to produce it in the future essentially keyed to what you have used before 4 acre feet per acre that you used. Then the legislature has told us, we cannot stop people that have a right to produce from exporting. I'm sure there are people in this community that would like to have done that, but we couldn't do it. The legislature said in Section 122 in 2001 in Senate Bill 2, you cannot keep people from -- from exporting. You can't have a rule that prohibits that. So, once we tell people they can produce and we have a rule set up to try to conserve and preserve the aquifer, we'd still have to let them export. We can't say, sorry we want to keep that water here but we have --

JUSTICE O'NEILL: Well, there's another provision that's intended to treat new users the same.

MR. HICKS: You are talking about 113(e). We treat new users the same but to even get over to 113(e), you have to start off at 122(c). And I want to read that key provision to you, because it's essential to understand why it is Guitar that's arguing for a rule that violates 122(c) not us. We're following it. 122(c) specifically says that except as 113(e) permits, we, the district or any district have to treat exporters exactly the same as we treat in-district users. We cannot treat them differently. And so, we have said, look, if you or an in-district user, if you -- if you're an in-district user that was an irrigator, which is nearly everybody out there, you essentially use up, consumed. It is called consumptive use in the parlance of Water Law. You essentially use up 70 percent of the water that you pump out, when you are irrigating crops. It evaporates, transpires to the plants, and so on. You use 70 percent. 30 percent of it returns to the aquifer, which is helpful. You use 30 -- 70 percent of it up. And now under 122(c), to treat exporters the same as we treat in-district users we say, you have to produce. That's natural. If -- if you want an export permit you can export 70 percent of what you can produce, which is equivalent to the consumption that you'd use -- you would be engaging in if you produced and used it in the -- in the -- inside the district. You can touch in 70 percent out. Okay?

JUSTICE O'NEILL: I understand the rules. I understand the rules. I do. But -- but this does sort of create a franchise for prior users to use water in a different way.

MR. HICKS: That's what the legislature told us to do.

JUSTICE O'NEILL: And why? What purpose is served by allowing that result?

MR. HICKS: Because the legislature wanted to balance and required the districts to balance the idea of conserving the aquifer, the resource our board is charged with protecting. To balance that with the

fact that this is a scarce source and there are huge demands on it all over the state. El Paso is an example would like access -- at one point, would have liked access to this water but nobody knows what the situation is now. And so, the legislature said to the district, you'd have to balance. You have to conserve. That is a mandate we have. And another mandate we have is, you have to let people export if they want to. And so that -- those are the two key mandates we had. And then within that the legislature said you may -- you don't have to but you may recognize historic use. And historic use is an amount not a purpose of use, a kind of use. 36.116(b) and 36.001 subsections 9 and 29 I think make that clear.

JUSTICE O'NEILL: What -- what's the purpose for recognizing historic use?

MR. HICKS: The purpose for recognizing historic use is first, we are in -- this is -- as I keep saying this is the desert. There's not a lot of water to go around. You have to have some basis for allocating. Western water law for 150 years has recognized this concept.

JUSTICE O'NEILL: But --

MR. HICKS: And -- and this Court recognized it in the Edwards Aquifer Authority case, the Barshop [Barshop v Medina County Underground Water Conservation District, 925 S.W.2d 618 (Tex. 1996)] case. It imported that doctrine into groundwater law. And the purpose of recognizing historic use is those -- those are the people that in essence invested in the community -- that invested to produce the water. And --

JUSTICE O'NEILL: In the community.

MR. HICKS: Yes, they did historically.

JUSTICE O'NEILL: But would you agree that the historical use doctrine was sort of to keep water in the district and not to keep people who've been using it for crops to be divested of that water. Nobody really anticipated the transfer of water out of the district

MR. HICKS: No. No I don't think that's so. In its-- in its origins way back when, I don't mean in Texas and in Chapter 36, but in its origins way back when in western water law, that may have been as aspect of it, but people have always understood that water moves. It moves the money a lot of times. And it is just the issue that Justice Hecht was talking about. Is it more valuable? Or is it more return on cantaloupes or selling water to El Paso. And -- and so, it was simultaneous in Chapter 36 pretty much. Well, 1997 Senate Bill 1, 2001 with Senate Bill 2. Senate Bill 2, is when the legislature said essentially -- I'm sorry. I'm gonna back up. In 1997, the legislature said you get to recognize historic use. If people have been using water you have some tests to determine how much they used before. Then as things developed a little bit, I think the legislature began to sense with some of these districts. You might want to keep the water inside the district, we want to free the market up to some degree. We have a need in the urban areas for water. Some of these agricultural areas might think it's better to send the water out. And we want that to be able to happen. We don't require that to happen, but we want to allow that to happen. And we are mandating in 2001 that came and said, okay, historic use, you've been recognized in it, but you the districts -- if it's historic use whatever basis you have for allocating -- you cannot stop people from exporting it. So, it came down at essentially the same time. It's the same package of the legislation. This --

JUSTICE HECHT: It seems to me that the petitioner's case does not impinge on that. And it's not whether water is going out of the district or how much so that conservation is effected but who is going

to get to ship it?

MR. HICKS: It directly impinges on it. First, it directly impinges on 122(c) because if -- let's accept for the moment Guitar's argument, that essentially it doesn't matter what your production rights are, if you want to export, you have to come back into a new pool and get in line again with everybody, okay? Well, I can't remember I think it was Justice O'Neill who was saying, who's gonna do that? If they're an irrigator, they lose their place. They lose their preference. And it's a preference. There's no question it's a preference. It's a preference that we're permitted to put in place by the legislature, but they lose their preference, which means it is was Justice Hecht that --

JUSTICE HECHT: I would object some recognition to it but you're not bound by it. That's the -- the troubling thing here --

MR. HICKS: We were not required to recognize historic use. We were permitted to -- we were --

JUSTICE HECHT: The troubling thing about it is basically in the case that transfer was not a historic use. And so, sort of everybody is on a new footing.

MR. HICKS: The use is not a kind of use.

JUSTICE O'NEILL: Well, that's what we're here to decide. I mean, that's --

MR. HICKS: Well, in the only thing, but it's one 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. If you look at section --

JUSTICE O'NEILL: But doesn't historical use just sort of connotes tied?

MR. HICKS: It's the amount. It's the amount used. It so happened that because this is an agricultural area and because the wells were not metered historically, we had to find a basis for determining how much people use. And districts -- all districts use -- a lot of districts use different measures of that. We used an objective technically verifiable thing that said, how much did you irrigate to produce a crop during a certain time frame. But that wasn't because it was agricultural. It was because it was a good measure in this community. But if you look at 36.0019, you can see that there is a clear distinction between use as -- 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 agriculture, municipal and so on -- a whole host of things -- anything that is useful to society. But it distinguishes use from purpose. If you look at the provision that the legislature and Senate Bill 2 repealed with respect to whether -- whether a district, when it's evaluating an application to move water out of the district that said the district no longer can look at the purpose of that use. We can't look at the purpose of it because they repealed the provision. And that provision said--had said--it was the old 36.122(d)3 repealed in 2001. And it -- it used to tell us, we can look at the amount and purposes of use. Again, the distinction is made between amount and purposes. In 36.00129, which was added in 2005, they specifically talked about use as an amount. It only makes sense if you talk about it as an amount, not the kind of use.

CHIEF JUSTICE JEFFERSON: But this idea of -- you know all of this is private property. And you're -- you're looking at land. Justice Hecht and I couldn't -- there's a boundary between us. The lands looks exactly the same. He's a -- he's an irrigator and I'm rancher. And the water has not remained in the district. He's selling it to El Paso or to New Mexico and I can't. That seems to me to be some violation of--if

not -- of the precise term -- equal protection law just seems rather unfair.

MR. HICKS: It's only unfair if the ability to produce is unfair. If the rules for production are unfair or illegal --

JUSTICE MEDINA: Well, but let's pin the -- let's pin the horse -- or the cart for the horse. You can't -- you can't get the water out under your scheme so they can't produce.

MR. HICKS: Well --

JUSTICE HECHT: It seems -- it seems like production is based on the choices that you're confronted with. And you say, look. You can raise cattle or you can raise cantaloupe. Well I think that cantaloupes would be better. The Chief thinks cattle would be better.

MR. HICKS: Right.

JUSTICE HECHT: So, he doesn't need much water. I need more.

MR. HICKS: That's right.

JUSTICE HECHT: But in a -- in a sense, he's conserving water by not -- by not using it.

MR. HICKS: But the legislature could change Chapter 36 and say that. It has not said that. There is -- you cannot follow Guitar's argument through the statutory brambles and get what they are talking about.

CHIEF JUSTICE JEFFERSON: But the next problem is okay, let's say I'm not trying transfer but I'm trying to maintain or -- or get an operating permit. And that depends on the level of the aquifer, which for the foreseeable future is not going to let me really profitably use that water. And-- and isn't there something wrong with that as well. Whereas he -- he gets - he gets to -- he gets -- he gets a guaranteed amount.

MR. HICKS: There's only something wrong with it, if there's something wrong with the very concept of being able to protect historic use. That's the only way there's something wrong with that. And you--

JUSTICE O'NEILL: Unless we interpret historic use to mean type of use.

MR. HICKS: But then, you would be ignoring what the statute says. You don't go there. If you interpret it that way, you are forcing this district and we will force others to treat in-district users differently than exporters. You'll force us to. And if we had done that -- let us say we had passed the rule that our rule had done what Guitar said that the rule should be, all of the irrigators would have -- the people that have production permits -- the validation permit -- everyone that had had historic use would be saying, wait a second, you can't treat people differently for purpose of export then you treat them for purposes of production. And you are treating us differently because we had historic use that was recognized. That amount ended up determining how much we could pump. And now you're telling us, sorry forget about that when you want to export, which would be backdoor way forus to squelch export.

JUSTICE O'NEILL: But it all begs the question because if it's a new use, all you're asking them to do is go apply for an operational permit.

MR. HICKS: But it's not a new use because the use is not talking about the kind of use. You cannot find in the statute any basis for concluding that.

JUSTICE O'NEILL: What if it has never been transferred out of the district?

MR. HICKS: You don't know. I mean, it's gonna -it's likely gonna be used for municipal purposes in this situation but it isn't

necessarily true. There hasn't been export so nobody knows. Somebody can export it.

JUSTICE O'NEILL: But it doesn't answer my question though that if there have not been exports, why is not export a new use?

MR. HICKS: Export is not a use. Export is where you put or removing the water to. That don't tell you how you're using it.

JUSTICE MEDINA: I haven't studied the legislative history yet, but it seems to me that -- that -- that senators and people across the street are concerned about the marketability of the water and giving everybody an opportunity to have some economic gain there. And the scheme that you have set up or that is set up here, seems to me you have a lot of discretion here. And the discretion burdens the big landowners.

MR. HICKS: It does not burden them. You have to understand, your Honor, we are mandated to permit export.

JUSTICE: It is pretty simple.

JUSTICE: Right.

MR. HICKS: We are mandated to conserve the aquifer. Those are two mandates that as Justice O'Neill has highlighted can be in some tension. But we are permitted to recognize historic use. That is the legislative permission. And it is dictated that if we do that, if we permit it, we then can't turn around and say, ah but for export we're doing it differently. And you mentioned that is legislative history. In the Senate Interim Report before the 2000 Senate Interim Committee Report on page 72, they specifically explained groundwater produced for use outside of a district's boundaries should be managed, regulated or limited based on the same factors, used to manage, regulate or limit in-district use -- this goes to your question, including the number of and procedures such as district permit application requirements. In other words, we were told you have to treat them the same. And we have a safe harbor in a way we set it up by linking that. That is we treat them identically. We don't treat them any differently. You have to produce. You only get to effectively consume by sending it out or using it in the district 70 percent of the water. And you -- if you had historic use recognized, you get it recognized in effect, when you send it -- if you want to send it out. It has just no basis yet all for saying that use means type of use and export is not a use. It's a movement of the water. No different than pumping in and out of the ground.

JUSTICE WILLETT: You mentioned 0019 and 00129--

MR. HICKS: Yes.

JUSTICE WILLETT: -- to show that use means amount and not type.

MR. HICKS: Yes.

JUSTICE WILLETT: You read about some other citations earlier with Justice O'Neill to -- to bolster that. What else do you have?

MR. HICKS: 36.016(b), which talks about recognizing historic use -- not uses, not kinds of uses, but what you would actually use -- the physical use of it, that you took it, pumped it from the ground, or whatever you did -- that is one. 36.1071 directs us to develop a management plan, which has to be approved by the Water Development Board and soon. And then, it directs us in Subsection (f) of that provision to -- to have our rules be consistent with our management plan. Well our management plan is about sustainability of the operating amount. It's not about kinds of use. It's about amount, 63,000 acre a feet a year is the amount you can handle being drawn out of it and still stay sustained. So, it's all linked. And if we have permission to do this -

JUSTICE O'NEILL: Let me --

MR. HICKS: . Going otherwise would effectively be putting Texas groundwater law at odds with the history of western water law.

JUSTICE O'NEILL: Let me ask you this question. And I didn't see it from the briefing of the amicus briefs. How many grounds or districts in Texas have this sort of regulatory scheme?

MR. HICKS: By this sort, do you mean recognizing historic use?

JUSTICE O'NEILL: Well no, that the two different permits and the transfer out application. Is this pretty typical?

MR. HICKS: Let me put it this way. I don't know if it is typical. Some or like east of here or in much more water-rich areas, the Ogilalla wSPELLCHECK

JUSTICE O'NEILL: That's -- that's the answer. They all do it in different ways.

MR. HICKS: They all do it different ways. We are further along in our permitting than most of them. Thank you.

CHIEF JUSTICE JEFFERSON: Any other questions? Thank you.

REBUTTAL ARGUMENT OF RUSSELL JOHNSON ON BEHALF OF THE PETITIONER

MR. JOHNSON: Justice O'Neill, let me answer your question first. There are no other groundwater district in the State of Texas that have similar provisions that allow a complete conversion of historic use preserved under the right of historic use to a new use or transfer.

JUSTICE O'NEILL: Well, let me ask it this way. Are there any other transfer rules that tie transferability to differentiation between permits?

MR. JOHNSON: No, there are not. There are -- as counsel mentioned, there are groundwater districts that have chosen to preserve or protect historic use with the regulatory framework different than the regulatory framework applicable to all other new users.

JUSTICE BRISTER: If we adapt your rule, the farmers just keep irrigating.

MR. JOHNSON: They have protection for that which they have invested. They have been --

JUSTICE BRISTER: If we adapt your rule, they would have to keep irrigating because if they try to sell, they lose everything.

MR. JOHNSON: They would have to keep irrigating in order to preserve and protect their historic use under those rules.

JUSTICE BRISTER: And if --

MR. JOHNSON: -- but they would be on the same footing as every other landowner in the context of --

JUSTICE BRISTER: To sell to El Paso or whoever, they would apply again they would get a much smaller amount. And if we wanted, El Paso still wanted to buy, how could we get a market wire around that?

MR. JOHNSON: The short answer -- the short answer to how the market would wire around that is that El Paso would pay those farmers and not the farm, so that water will then be available for the district to allocate among all the landowners. That's the short answer. So, they would have additional value by virtue of that preservation of there historic --

JUSTICE BRISTER: But they have to pay all of them.

MR. JOHNSON: Or the number you needed to free up the sufficient amount of water to -- to acquire sufficient quantities to move it to El

Paso and yes the market would still operate, it will just operate fairly. Everyone could participate. And that -- and that gives them the protection that the legislature intended which is --

JUSTICE O'NEILL: No but at some point, if transfer out became more lucrative they would give up the irrigation purpose and apply to the same pool an operational permit as everyone else.

MR. JOHNSON: Absolutely. That's what the legislatures had in mind. And by the way, counsel misreads 122 Section (q). What that section says is the district can adapt the rule that says if we want to export, you only get 1 acre foot. But if you want to use it in-district you get 2 or 3 acre feet. That's what that provision is about. They cannot make a distinction in terms of the new application that walks in, based on where the water is going to go. That's what that section relates to. And I think it's important to go back to what this case is not about. First of all let me mention Sipriano as well. In Sipriano where this court considered the rule of capture and its implications, the Court recognized clearly that there was a property right associated with the rule of capture. And in fact, even in the concurring opinion we're recommending a consideration of the restatement of torts, there's an acknowledgment that all landowners share in the resource. In fact, the whole purpose of the restatement of tort provision is to acknowledge that shared resource. So, such a scheme as created by this district would never be countenanced under a reasonable use rule, American rule, or relative rights rule. You pick the rule. Each of those acknowledges that this is a shared resource. In this case, the legislature has amended if you will the rule of capture to now say, districts we're gonna give you the power to prevent the kind of Sipriano fact situation that exists. We're gonna give you the power to preserve and protect historic use.

JUSTICE HECHT: And they envision that -- that this would be a local decision.

MR. JOHNSON: Indeed. The -- the -- the decisions with regard to how to use these management tools, that were being given were left to the local districts because frankly there are differences among the groundwater districts conditions throughout the State.

JUSTICE HECHT: Well and I suppose differences in the constituents, and differences in how the boards are chosen, and what the priorities are.

MR. JOHNSON: And goals and -- and what they're to accomplish indeed but what the legislature made abundantly clear was that they were trying to overlay a regulatory scheme on a property right. 36.102 basically says, legislature acknowledges that we are regulating a property right here. And we want you to read this as they -- as they said as recognizing those property rights.

JUSTICE MEDINA: And since the legislature did all-- went to all that trouble to give this authority to local government, it should be less government, why should we leave it to the discretion of the local parties involved?

MR. JOHNSON: Because this district has exceeded the authority that the legislature granted to Chapter 36 districts and has done so in a way that is discriminatory to landowners that have conserved their water rights, in essence provided a scheme where a limited number of landowners benefit from the shared resources.

JUSTICE MEDINA: Will that cause us to look at every other district's scheme to determine whether or not it's done fair and just?

MR. JOHNSON: Well, there is a remedy for anyone that is disadvantaged by unfair, unjust, partial, or discriminatory rules of

the groundwater district. I would suggest that this is a unique circumstance within this district and is not reflective of whatever groundwater districts --

CHIEF JUSTICE JEFFERSON: How many other suits are there that -- that you're aware of against districts on the way they manage or regulate water?

MR. JOHNSON: I'm not aware. There are some, there are some both procedural and substantive with regard to rules that have been adapted, not many. None have made. There are number of cases arising out of the implementation of the Edwards Aquifer Authority legislation, which predates this. But as far as other groundwater districts, there are very, very few.

JUSTICE HECHT: The briefs identified five -- five permits. Is that still the state of the --

MR. JOHNSON: Yes.

JUSTICE HECHT: -- before irrigators and -- and your client.

MR. JOHNSON: Yes.

JUSTICE HECHT: And there's a big dispute about whether the aquifers gotten over 3580 feet in elevation. Do we know --

MR. JOHNSON: I do not know today. They would be unlikely to be above 3580.

JUSTICE HECHT: Some hope that if we keep the consumption down, it might get there -

MR. JOHNSON: To date, the last time I checked it did not reach that number.

CHIEF JUSTICE JEFFERSON: Well, these numbers were before last summer's rain [inaudible], right? They didn't have any -- they didn't have --

MR. JOHNSON: No, I do not have information based on last summer's rains, but there has been also a lot of irrigation use in the district.

JUSTICE WILLETT: Could you explain to me how the transfer rules, not the production rules, but the transfer rules discriminate among water users in the district?

MR. JOHNSON: The transfer rules discriminate by linking the amount you can transfer to the underlying permit that -- that the applicant had. So, in essence they incorporate the limits of the operating permit, the absolute prohibition on use of water above 3580 into the new users like the Guitar family would be in the event they chose to transfer.

JUSTICE MEDINA: How are the board members chosen here?

MR. JOHNSON: My -- I see my time is --

JUSTICE: Well, answer the question.

MR. JOHNSON: I'm sorry. The question?

JUSTICE MEDINA: How are the board members chosen?

MR. JOHNSON: They are elected. And keep in mind, in this district we're talking about a very small population centered around the irrigation community in Dell City. All the board members are farmers.

JUSTICE MEDINA: Well, seems like they have a lock. My idea was perhaps they -- we can change this by the election of the board members.

MR. JOHNSON: That's difficult to do. Thank you.

CHIEF JUSTICE JEFFERSON: Any other questions? Thank you, Counsel. The files are submitted and the court will take a brief recess.

MARSHALL: All rise.

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