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A second argument of the City contended that Hamilton Trust's groundwater reservation violated the Texas Constitution's prohibition against the establishments of perpetuities, but the court quickly dismissed the argument. The City argued that because the Hamilton Trust failed to reserve access rights to the fifteen-acre tract, and thereby a means of reaching the groundwater, the severance of the groundwater rights would result in permanent alienation of the water resource, in contravention of public policy. Dismissing this argument, the court pointed out that Hamilton Trust would not need access to the fifteen-acre tract to pump the groundwater from beneath it. Hamilton Trust may access the groundwater from its own adjacent ranch, and as a result, the reservation does not violate the Texas Constitution's prohibition against perpetuities.

For the foregoing reasons, the court affirmed the district court ruling, holding that Hamilton Trust validly reserved groundwater rights, and the City could not continue pumping groundwater from its fifteen-acre tract.

Jeff McGaughran

Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910 (Tex. 2008) (holding that water districts, when promulgating rules according to the Texas Water Code's goal of maintaining historic use, must consider both the amount of water historically used and the water's historical purpose).

Texas established groundwater conservation districts to manage the state's groundwater. These districts have broad authority to develop a management plan to conserve and protect groundwater within that district. The Texas Water Code ("Code") mandates the districts consider all types of groundwater uses and needs to develop fair and impartial rules. However, when enacting rules limiting use, a district may prioritize existing rights by safeguarding historic uses.

Due to inefficient planning and an arid climate, Hudspeth County Underground Water Conservation District No. 1 ("District") revamped its groundwater management plan. The new plan detailed three types of permits: (1) validation permits, (2) operating permits, and (3) transfer permits. The District granted validation permits to well users who had permits before the District promulgated this new plan. These permits entitled those users to withdraw three to four acre-feet per year for every acre irrigated during a designated historic period. If the user could not obtain a validation permit, the landowner could then apply for an operating permit. This permit calculated water use based on surface acreage, but operating permit holders could only extract water when the aquifer's water table reached a certain elevation. So, unlike the validation permit, which guaranteed a water right, an operating permit only granted water access during certain conditions. Finally, both validation and operation permit holders could apply for transfer

permits, which allow the landowner to transfer captured water out of the district. Thus, validation permit holders had a considerably greater transfer right because they had guaranteed water rights based on historic use.

Guitar Holding Company (“Guitar”) challenged this water scheme because despite owning significantly more land than other users, the District permitted other landowners to withdraw more water based on increased irrigation during the historic period. While the historic permit holders used the water for irrigation, the new users transferred the water out of the district. Under the new scheme, not only could the other landowners use more water, they could also transfer more water.

Both the District Court of Hudspeth County and the El Paso Court of Appeals upheld the District’s new management plan. Guitar argued the plan exceeded the District’s authority under the Code’s goal to preserve existing groundwater uses by granting certain landowners a perpetual franchise to transfer groundwater out of the district. The company argued the plan’s historic use requirement should link the type of use to its historic use. Thus, because historic users did not transfer the water out of the district, the District cannot now grandfather in a new usufructuary transfer right. The District responded, arguing that historic use only referred to the amount of water, regardless of its purpose.

The Supreme Court of Texas determined the meaning of the word “use” in order to analyze the extent of the District’s authority under the Code to preserve historic or existing use. When interpreting a statute, the court understands otherwise undefined terms to carry an ordinary meaning, as construed within the rest of the statute. “Use” ordinarily conveys some sort of purpose by the user, a meaning consistent with the application of the word in the rest of the Code. Additionally, the Legislature’s definition of “evidence of historic or existing use” included evidence of water’s beneficial use. Finally, policy concerns dictated a definition that includes purpose and amount because the District must effectively regulate groundwater and preserve existing uses. The court determined that when preserving a historic use, the District must determine not only the amount of water withdrawn, but also that water’s purpose.

Additionally, Guitar argued that a transfer permit is a new use. This classification is important because the District can impose more restrictive conditions on a new permit application. The court agreed with Guitar. If the District did not consider a transfer permit a new use, certain landowners could convert their entire water supply into a transfer permit without any restrictive conditions.

Finally, the court concluded that the new transfer rules did not protect existing uses because the rules allowed permit holders to change their use and transfer water out of the district. Once the user

transferred the water out of the district, there would no longer be a justification for protecting existing use because the user would not be utilizing the water for an existing use. The new rules did not protect existing uses but, in effect, created franchises for certain landowners. Because the District did not uniformly apply the limitations, the court found it exceeded its statutory authority and the rules were thus invalid.

The Supreme Court reversed the court of appeals' judgment and remanded the case for further proceedings.

Shannon Carson

UTAH

Conatser v. Johnson, 2008 UT 48, 194 P.3d 897 (Utah 2008) (holding that the public's easement in state waters includes any lawful activity that utilizes the water and any touching of privately owned river beds incidental to these activities is lawful).

In June of 2000, Plaintiffs Conatsers floated down Weber River in a rubber raft. The Johnsons, Defendants in this case, privately owned certain parcels of the riverbed below the non-navigable waters of the Weber River. While the Conatsers floated down the Weber River, Kevin Conatser exited the raft and walked along the riverbed owned by the Johnsons to fish and to remove the obstruction of a fence. The bottom of the Conatsers' raft and the paddles touched the part of the riverbed owned by the Johnsons. Upon exiting the Weber River, a Morgan County Deputy Sheriff cited the Conatsers for criminal trespass. While the criminal trespass charges were pending, the Conatsers sought a declaratory judgment in the Second District Court to determine if the public's easement in state waters included the right to touch privately owned riverbeds. The district court held that the public's easement to state waters only included activities performed upon the water; therefore, the public's right to touch privately owned riverbeds only included touching incidental to the activity of floating. The Supreme Court of Utah reversed.

Utah law provides that the public has an easement over state waters, regardless of who owns the riverbed below. The Court rejected the district court's narrow interpretation of the easement's scope and clarified that the public's easement includes the right to participate in any lawful activity that utilizes the water, not just activities performed upon the water. Therefore, in addition to the right to float upon the water, the public's easement includes the right to participate in activities such as fishing, hunting, and swimming.

The Utah Supreme Court's departure from the district court's narrow interpretation of the public easement demanded an equal departure from the district court's narrow holding that only touching incidental to the activity of floating is lawful. Although the district court's conclusion logically followed from the district court's interpretation of