Livestock Weekly
Internet Edition April 30, 2009
News

Cattlemen Advised Of Attorney's Concerns Regarding Groundwater

By Colleen Schreiber

FORT WORTH — "The future of groundwater in Texas is changing under your very feet."

That was but one of the "red alert" messages that Russ Johnson gave those attending the recent Texas and Southwestern Cattle Raisers Association annual convention here.

Johnson, an attorney with the Austin firm of McGinnis, Lochridge & Kilgore who specializes in water law, recently prevailed at the Texas Supreme Court in the case *Guitar Holding Company L.P. v. Hudspeth County Underground Water Conservation District No. 1, et al.* It has been touted as the most historic groundwater case since *Sipriano* in 1999.

Johnson, who spoke during the TSCRA's natural resource committee meeting, specifically addressed the changes coming down the pike with the respect to groundwater regulation in Texas and how such regulation could affect landowners, particularly ranchers.

"I feel a little bit like Paul Revere running through the streets saying the British are coming, the British are coming," Johnson told listeners. "Government regulation of groundwater is reality. It is a reality in the form of groundwater conservation districts, and these districts do not have adult supervision. They remind me of my teenagers when I give them the car keys, the credit card and the keys to the liquor cabinet. There is no one looking over the shoulder of these groundwater districts as they make these decisions."

Beyond that, Johnson told listeners that he is particularly concerned with some aspects of the state's water planning process. For example, in 2005 the legislature passed HB 1763, which essentially called for groundwater conservation districts within the 16 defined groundwater management areas to decide how they want aquifers in their respective regions to look 50 years from now. Specifically, the "desired future condition" as defined by the Texas Water Development Board is "the desired, quantified condition of groundwater resources (such as water levels, water quality, spring flows, or volumes) for a specified aquifer within a management area at a specified time or times in the future or in perpetuity (e.g., within 50 years)."

Once the GMAs have determined their DFC, it is then given to the

TWDB, and using a groundwater availability model, they in turn come up with the managed available groundwater that can be produced annually from individual aquifers.

"That sounds like scientific determination of how much water is available within the aquifer," Johnson told listeners, "but it is not. In fact, it bears no relationship to how much water can actually be produced from the aquifer. Rather, it is an arbitrary decision that really has little to do with science. In fact, the GAM models magically say that the amount of water that can be produced within a given geographic area just so happens to equal the amount of water currently being used."

Johnson noted that groundwater conservation districts by law are required to permit, to the extent possible, up to the point that the total volume of groundwater permitted equals the managed available groundwater amount. However, Johnson said, some groundwater conservation districts have suggested that the requirement is an impediment to conservation. In an attempt to get around that, the Texas Alliance of Groundwater Districts, which represents the state's groundwater districts, has asked the legislature for the authority to assess user fees to the tune of about $100 an acre-foot.

"That is a pretty startling number," Johnson remarked. "That's about three times higher than any groundwater production fee currently being assessed."

The GMAs are statutorily charged with completing the task of defining their DFC by 2010. Someone from the audience asked Johnson what happens when the various groundwater districts within a GMA can't agree on what the DFC should be.

"When GMA 8, which covers the DFW area all the way to the Red River, couldn't agree, they simply adopted different DFCs for every county in their GMA," Johnson responded. "The whole idea was to have uniform regulation, but because of local concerns or local issues, there are desired future conditions that are different for virtually every county in a GMA."

Johnson also noted that even those who currently live outside the boundaries of a groundwater district may still be negatively impacted by this regional planning effort. That's because within these groundwater management areas, groundwater districts are deciding what the desired future conditions should be for all the areas within that groundwater management area, whether it's in a groundwater district or not.

Emotions, mainly fear, Johnson said, rather than science tend to play a large role in the planning process.

"There is a fear that somehow there will be unregulated massive reduction in the local groundwater supplies that will result in the catastrophic loss of the resource," Johnson remarked.

And in fact, even though the state water plan points out that an estimated 13.5 to 14 million acre-feet of groundwater are available annually, that number may be reduced by as much as 40 percent as a consequence of the regional planning effort.

"And believe me, once there is a cap or a limit on the amount of water within an area that can be used, there is a brutal fight over who has access to that water," Johnson told listeners. "In almost every case it is the ranchers, who have historically conserved the resource, who lose the fight. That is because in almost every groundwater district there is a predisposition to take care of and protect historic users, i.e. irrigators.

"Believe me when I tell you that those landowners who do not have extensive historical use — ranchers, in particular — who have not recently exercised their groundwater rights, could be in real danger of losing their ability to exercise those rights in the future," he reiterated.

This is the situation the Guitar family faced in Hudspeth County when their property came under the jurisdiction of a groundwater conservation district in the early 1990s. The area happens to be a water-rich area. In its planning effort, the City of El Paso listed as a potential future water source this aquifer in Hudspeth County. Herein lies the problem, Johnson said.

"The groundwater conservation district in Hudspeth County created rules that basically granted all the water that was available to a limited number of farmers in the district and then gave those farmers the perpetual right to sell water to the City of El Paso," he explained.

Because the Guitar family had not farmed their property within the defined historic use period, the groundwater district's rules basically prevented the Guitars forever from producing any groundwater for any commercial purpose.

More important, he said, the rules allowed the "favored few," those farmers who qualified as historic users, to convert this protected historic use to an entirely new use and still keep the same protection that they had as historic users. In other words, the historic users could convert that use from irrigating crops to selling their water outside the district without having to comply with the same transfer rules that any other new user would have to comply with.

It is this issue that Johnson ultimately challenged before the Texas Supreme Court in December 2007.

"We lost at every step right up to the Supreme Court," he told listeners.

And though the Guitars ultimately prevailed, they still have yet to be granted any additional right to produce groundwater despite the fact that the

Supreme Court rendered its decision in May 2008. Johnson told listeners that the district is still considering what it's going to do in response to the Supreme Court decision.

Johnson assured his audience that groundwater districts are well represented by TAGD and there is some concern that they may turn to the Texas legislature for help.

"They have incredible power in the Texas legislature," he insisted.

Johnson encouraged listeners to check out TAGD's website, and in particular he suggested a perusal of a publication entitled, "Groundwater in Texas," which can be found on the website.

"It is kind of their blueprint view of the world," Johnson said. "For example, they take the position that you do not have a property right in groundwater and therefore they are free to regulate it away without any Constitutional limitations.

"What's even more disingenuous is that they say it's been over 100 years since groundwater was considered to be a vested property right in Texas. Well, folks, that is just B.S. That is not the law. In fact, since 1904 the Texas Supreme Court has recognized that landowners have a vested right in groundwater. That doesn't mean you own the water; it doesn't mean you can protect those molecules; but it does mean that you have a vested right to produce groundwater for beneficial use, and that has to be recognized by the government. It can be regulated, but it has to be recognized," he stressed.

The most recent case in which that vested property right was recognized by the courts was in the case of *City of Del Rio v. Clayton Sam Colt Hamilton Trust*. The broad details of this case are that prior to conveying a piece of property to the city, the trust reserved its groundwater rights. Five years later the city decided to drill a well on the property despite the deed reservation by the trust. The city sued the trust, claiming that because a landowner doesn't have a vested right in groundwater, the groundwater reservation by the landowners was ineffective.

The case was decided in favor of the trust at the court of appeals level, Johnson said, but the City of Del Rio has asked the Texas Supreme Court to review the decision.

Day and McDaniel v. Edwards Aquifer Authority is another recent example of a court decision confirming that landowners have a vested property right with respect to groundwater. In this case Day had an artesian well that drained into a tank on his property. Day then used the water from the tank for irrigation purposes. The landowner applied for a permit from the Edwards Aquifer Authority but was denied. Day challenged that denial, and in addition filed a takings suit, claiming that if in fact the permit could be denied, then it constituted a taking of a private property right.

The district court, Johnson said, disagreed with the takings claim and dismissed it. However, on appeal the court said that landowners have a protectable property right and that the case should be heard by the district court.

"That decision has caused groundwater districts to panic," Johnson told listeners.

"Again, by recognizing that a landowner has a property right in groundwater, the courts are saying to groundwater districts that they have to realize and recognize a landowner's rights in the regulation process. In other words, the regulation has to be reasonable," he reiterated.

Even though the courts have continually ruled in the landowner's favor, Johnson told listeners that he's concerned that groundwater districts are going to ask the legislature for some relief from that provision in this legislative session.

"If not this one, then in the next," Johnson told listeners. "The theme that they're going to present is that in order to protect this resource, that the state has asked them to regulate, groundwater districts need to be free of vexatious litigation by landowners when districts decide who gets water and who doesn't."

With that he wrapped up his presentation by reiterating his plea to landowners to get involved with their groundwater districts, to pay attention to what's going on not only locally but at the regional and state level, and in particular at the state legislature. He noted that some two dozen groundwater conservation district bills are up for consideration during this legislative session.

"Any one of them could be, as they say, a vehicle for mischief," Johnson warned. "Most of these bills are designed to give groundwater districts additional power. They don't take away the property right that I've been talking about, so I haven't hit the red alert panic button yet, but that could change and we need to be very mindful of that," he reiterated. "We are looking to make sure that doesn't change in the next several weeks."

He also offered a brief discussion on a bill introduced by Rep. Frank Corte which would make some changes to the appeals process with respect to DFCs.

"Rep. Corte's bill would provide some adult supervision to these districts in the form of TWDB," Johnson said. "I'm all for adult supervision. It is almost a punishable offense to say the state needs to get involved, but when it comes to supervising the district's decisions there needs to be some real state involvement," he insisted.

In a question and answer session, Jack Hunt, CEO of King Ranch, who is also a member of the TWDB, told fellow TSCRA members that

while he largely agreed with the majority of Johnson's remarks, he was more interested in finding solutions to the current problems. Specifically, he asked Johnson for suggestions on how to fairly solve the controversy between who gets the water and who doesn't.

"What I'm more interested in is how you fix this," Hunt commented. "The two things that come to mind are either we go to a correlative approach which tends to protect ranchers, or we go to adjudication which will enrich a whole generation of lawyers."

Correlative rights, Johnson explained, is where everyone basically has equal rights to the water and adjudication is where existing use is essentially protected.

"I don't believe it's just those two either/or alternatives," Johnson opined. "I believe there is a way to manage the resource and still recognize the correlative rights of landowners without just arbitrarily saying that everyone gets a share. You do that by combining some elements of adjudication with elements of correlative rights so that you have a protected category of use so long as that use continues for that purpose, and then you recognize a correlative right within the district for new users that's equivalent to the amount of water that should be or could be produced from the aquifer."

Hunt also commented that he is very concerned about the amount of water that is disappearing on paper just as Johnson described.

"One thing that I believe would help is a requirement by these groundwater districts to determine how much total available water is producible from their aquifers," Johnson responded.

He told listeners about an aquifer east of Austin that has an estimated 200 million acre-feet of available stored supply.

"That's about eight times the total capacity of all the reservoirs in the state," Johnson pointed out. "Yet it is largely untapped. In fact, it's so underused that it rejects recharge."

Like many GMAs, this particular GMA has decided that their current production is their managed available groundwater number.

"That puts that 200 million acre-feet of groundwater off-limits to the state forever," he remarked.

Another possible answer to this problem, Johnson said, is to incorporate mitigation into the groundwater management process.

"If we decide today to protect every historic user's right to continue to produce just the way they've been producing, then we are putting all our groundwater supply off-limits except for those that are currently using it,"

he reiterated. "However, if we say 'Let's implement a plan where we can insure those historic users can continue to produce their water by mitigating the impacts of additional water production,' then all of a sudden you have a system that can accommodate additional production," Johnson explained.

"Now, I'm a little bit reluctant to bring mitigation authority to groundwater conservation districts," he continued, "but rather than trying to arbitrarily protect that historic user, I think the better method is to say we want to insure that historic users can continue to use water but we want to make sure that others can continue to use water as well, and there should be some method of insuring that both can be accomplished."

Finally, there was a question about possible regulation of groundwater conservation district boards. Johnson pointed out that some of the boards are locally elected but some are appointed by county commissioners, cities or some other interest groups.

"I'm all in favor of elected boards," Johnson replied. "There's a definite connection between the board and the electorate when there's a ballot box, but the truth is it's a lot easier to create a district that does not have an elected board, and unfortunately, more than half of the boards are not elected."

Johnson concluded by telling listeners that he supports reasonable regulation.

"Don't hear this speech as anti-regulatory. However, I am reminded of what Barry Goldwater said, and that is, 'Beware, a government big enough to give you what you want is big enough to take it all away.'"