



# Water Grand Challenges: Water Governance

## Groundwater Rights in Texas

**Background** – Texas has established regulatory policy for groundwater and surface water differently, and approaches each as individual processes. Through political inertia and court precedence, this separation has persisted throughout Texas history. According to the Texas Water Code, groundwater is water that resides or flows in the subsurface. It is known as percolating water or well water. Despite the legal separation, through modern technology, we now understand that surface and subsurface waters are inextricably linked.

**Groundwater History in Texas** – In 1904, the Texas Supreme Court set the precedent for groundwater rights by ruling in favor of the English common law system of ownership (often called the rule of capture or law of the biggest pump) in the *Houston and Texas Central Railroad Co. v. East* case.<sup>1</sup> The court ruled that the rule of capture was the rule for liability (or not) as between landowners pumping water.

Other cases like [Sipriano v. Great Spring Waters of America](#) (1999) approached the notion of whether or not the rule of capture should be abandoned for the rule of reasonable use, that is, the common-law right of a “surface owner to take water from a common reservoir to the detriment” of a neighbor would be limited.<sup>2</sup> However, the Texas Supreme Court found that water reform is a legislative function and that, excepting willful or malicious misuse, the rule of capture still holds.<sup>2</sup>

The rule of capture has been consistently upheld in court since 1904, with few exceptions, the first exception being the *Beckendorff v. Harris-Galveston Coastal Subsidence District* (1977) case. In this court case, the Texas Supreme Court ruled to protect public welfare by limiting harmful pumping, which was causing ground subsidence of the land resulting in flooding. In 1993 the Texas Legislature passed Senate Bill 1477 ([S.B. 1477](#)), which created the EAA to gather data, issue permits for groundwater, manage withdrawals, and implement drought management practices.<sup>3</sup> The formation of the EAA was necessary to manage the aquifer and protect endangered species, and was tasked with managing groundwater in the Edwards Aquifer. The EAA has the additional benefit of protecting the sustainability of the region’s springs and, by proxy, the drinking water for nearly 2 million Central Texans.

**Groundwater Policy in Texas** – The Texas Water Development Board (TWDB) is the regulatory agency responsible for approving plans for groundwater resource management at the local level. Through the TWDB, there are 99 Groundwater Conservation Districts (GCDs) that are responsible for implementing an effective management plan for groundwater resources.<sup>4</sup>



After the districts, the legislature has created a system of 16 locally represented Groundwater Management Areas (GMAs) that cover larger regions in the state. These GMAs create and implement regional groundwater management plans.<sup>5</sup> If an aquifer is in danger of overuse, the Texas Commission on Environmental Quality (TCEQ) has the authority to create a Priority Groundwater Management Area (PGMA).<sup>6</sup> In addition to GMAs and PGMA, the Legislature has authorized nearly a hundred locally created and elected Groundwater Conservation Districts (GCDs), which have the authority to oversee pumping and enact limits necessary for aquifer protection.<sup>7</sup> Texas has several regulatory and planning agencies, commissions, and boards that oversee the finance, management, and enforcement of the laws and rules relating to the use of groundwater. The TWDB provides management, oversight, and financial support to GMAs, GCDs, and others. The TCEQ is the enforcement arm of water quality and quantity concerns. The Texas Railroad Commission oversees all waters used in mining and petroleum extraction.<sup>8</sup>

**Recent Policy Developments** – In 2011, during the 82<sup>nd</sup> session, the Texas State Legislature passed, [Senate Bill 332](#), which states that landowners have a vested ownership interest in the groundwater beneath their property. This bill affirms that landowners have a vested interest in the groundwater under their land, and therefore they have certain constitutional protections from unreasonable regulations or ‘takings’. Previously the right of ownership was realized when the water was actually captured. The first court case to test this new law was the [Edwards Aquifer Authority \(EAA\) v. Day and McDaniel](#) case, and while it was determined that landowners do have a vested interest in groundwater under their land, the court has yet to decide if a constitutional taking occurred in this particular case. With these changes, landowners now have ownership of the groundwater while it is still in the subsurface and do not have to pump in order to acquire ownership. This seemingly subtle change in the language of the law could potentially hinder GCDs from creating adequate pumping restrictions, which could greatly alter the ability to preserve future supplies. The ramifications of this legislative action and the are still being sorted out in court cases across the state.

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<sup>1</sup> The Supreme Court of Texas. *Houston and Texas Central Railroad Co. v. East*. 98 Tex. 146, 81 S.W. 279 (1904)

<sup>2</sup> The Supreme Court of Texas. *Sipriano v. Great Spring Waters of America*, 1 SW 3d 75 (Tex. Supreme Court 1999).

<sup>3</sup> The Supreme Court of Texas. "The Edwards Aquifer Authority and the State of Texas, Petitioners vs. Burrell Day and Joe McDaniel, Respondents." Official Site of the Supreme Court of Texas. February 17, 2010. <http://www.supreme.courts.state.tx.us/historical/2012/feb/080964.pdf> (accessed March 27, 2013).

<sup>4</sup> Texas Water Development Board. "Groundwater Conservation Districts." [http://www.twdb.state.tx.us/groundwater/conservation\\_districts/](http://www.twdb.state.tx.us/groundwater/conservation_districts/) (accessed June 6, 2013).

<sup>5</sup> Armbrister, Kenneth. "SB 1477, 73rd Regular Session ." *Legislative Reference Library of Texas*. September 1, 1993. <http://www.lrl.state.tx.us/legis/billsearch/BillDetails.cfm?legSession=73-0&billTypeDetail=SB&billnumberDetail=1477>(accessed March 2013, 28).

<sup>6</sup> Texas Water Development Board. *Groundwater Conservation District (GCD) FAQs*. 2013. <http://www.twdb.state.tx.us/groundwater/faq/index.asp#title-02> (accessed March 27, 2013).

<sup>7</sup> Texas Commission on Environmental Quality. *Priority Groundwater Management Areas* . January 24, 2013. <http://www.tceq.texas.gov/groundwater/pgma.html#whatis> (accessed March 27, 2013).



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<sup>8</sup> The Railroad Commission of Texas. "Groundwater Management." *The Railroad Commission of Texas*. n.d. <http://www.rrc.state.tx.us/environmental/environsupport/groundwatermgnt.php> (accessed March 27, 2013)