



## ENERGY CENTER

The Center for Global Energy,  
International Arbitration and  
Environmental Law

ABOUT

RESEARCH AND PROJECTS

EVENTS

STUDENTS

NEWS

BLOG



# Rule of Capture Undermines Groundwater Regulation in Texas

by [Vanessa Puig-Williams](#)

January 26, 2015

In mid-western Hays County, a groundwater war is escalating. [A private water supplier](#), with goals to pipe and sell close to 6,000 acre feet of water per year has strategically located a well field in an area of the Hill Country where the Trinity Aquifer is unregulated. Unlike the more recent groundwater controversies involving decisions by groundwater districts east of Austin to permit or limit the amount of groundwater being transported to the west, the situation in Hays County is different, as it has exposed an innate flaw of the rule of capture, one that is magnified in our modern era of groundwater regulation – the doctrine’s inability to protect a natural resource and the landowners who reasonably depend on it.

The contentious well field is situated outside the jurisdiction of the Hays-Trinity Groundwater Conservation District and the Barton Springs/Edwards Aquifer Conservation District but within the boundaries of the Edwards Aquifer Authority (EAA). (See recent Austin American Statesman article [here](#)). The geology of the area has allowed the company to drill test wells through a thin portion of the Edwards Aquifer formation and pump water from the Trinity, where EAA authority does not extend and where no groundwater regulations apply. Locals and nearby groundwater conservation districts are referring to the Trinity beneath the Edwards Aquifer as an unprotected “[white zone](#),” and [many are concerned](#) that the water is ripe for the taking by water suppliers looking to sell water to support growing central Texas.

Without a groundwater conservation district to issue permits and enforce pumping restrictions, under the rule of capture, this water supplier can pump an unlimited amount of groundwater from the Trinity without liability, even if doing so causes the wells of neighboring landowners to run dry. And [according to hydrogeologists](#), this is a real possibility. The fact that a corporate water supplier is using the rule of capture to its financial advantage has infuriated many locals, but courts have long approved of this practice.

In the 1904 landmark case of *Houston Texas Central Railroad Company v. W.A. East*, the Texas Supreme Court adopted the rule of capture in Texas.<sup>[i]</sup> In *East*, the Houston and Texas Central Railroad Company dug a groundwater well on property it owned in Denison, Texas to supply water for its locomotives and machines shops. The well produced about 25,000 gallons per day, ultimately causing the plaintiff’s domestic well, which was dug prior to the railroad company’s well, to run dry.

A major point of discussion for the Court was the fact that the railroad was using the groundwater for manufacturing purposes rather than for domestic purposes. The opinion discusses and relies on several cases where other courts maintained that a defendant landowner can pump groundwater to sell to a town or to use in manufacturing, mining, or brewing “whatever may be its effect upon his neighbor’s wells and springs.”<sup>[ii]</sup> One of these opinions from 1859 in England, *Chasemore v. Richards*, concerned a defendant landowner who used percolating water from his property to supply to a town, consequently reducing water in a neighbor’s stream to the point where he could no longer operate his mill. In *East*, the Texas Supreme Court noted that Lord Wensleydale, one of the Justices in *Chasemore* “expressed doubt as to the correctness of the conclusion reached” even though he “admitted to the soundness of the rule of capture.”<sup>[iii]</sup> According to the Texas Supreme Court, “[h]is doubt arose out of the fact that the defendant was not using water for his own purposes but was selling it to others.”<sup>[iv]</sup>

In 1999, the Texas Supreme Court upheld the rule of capture in *Sipriano v. Great Spring Waters of America (Ozarka)*<sup>[v]</sup> when asked to decide whether the bottled water company could be held liable for pumping 90,000 gallons of groundwater a day from its property, resulting in neighboring landowners’ wells going dry.

While the Texas Supreme Court recognized that the rule of capture is “harsh” and “outmoded” and has been “severely criticized,” it was unwilling to change the law, instead, punting the decision of whether to abandon the rule of capture to the Texas Legislature.<sup>[vi]</sup> The Court’s decision in *Sipriano* rested primarily on the 1917 Amendment to the Texas Constitution, which placed the duty to protect the State’s natural resources in the hands of the Legislature and on the Legislature’s efforts at that time to regulate groundwater in Senate Bill 1.<sup>[vii]</sup>

Since the *Sipriano* decision in 1999, the Legislature has made considerable progress in regulating groundwater across Texas. The Legislature has approved the establishment of close to 100 groundwater conservation districts.<sup>[viii]</sup> Moreover, under [Chapter 36 of the Water Code](#), the Legislature has created a process where groundwater districts with jurisdiction over the same aquifers work together in a groundwater management area (GMA) to establish desired future conditions for these aquifers. Desired future conditions or DFC’s are “the desired, quantified conditions of groundwater resources (such as water levels, water quality, spring flows, or saturated thickness) at a specified time or times in the future...”<sup>[ix]</sup> Under Chapter 36, a GMA submits the DFC for an aquifer to the Texas Water Development Board who uses it to determine the modeled available groundwater (MAG) for the aquifer. Groundwater conservation districts use the MAG in their permitting decisions, as Chapter 36 requires groundwater districts to manage groundwater in a way that achieves the adopted DFC.<sup>[x]</sup>

Under the nose of the Edwards Aquifer Authority, however, on an unregulated well field in Hays County, the rule of capture is undermining this regulatory framework. For the portion of the Trinity Aquifer governed by GMA 9 and the Hays-Trinity Groundwater Conservation District, the annual amount of water the water supplier intends to pump (5,600 acre feet) is over half of the MAG (9,100 acre feet per year) that the Texas Water Development Board determined is available to permit for the district to achieve its DFC. Even more alarming, for the portion of the Trinity Aquifer that falls under the jurisdiction of GMA 10 and the Barton Springs/Edwards Aquifer Conservation District (BSEACD), the Texas Water Development Board determined that the MAG is 1,288 acre feet a year. The water supplier has plans to pump 4,300 acre feet more than the MAG. BSEACD is concerned that this excessive withdrawal of groundwater will interfere with the groundwater district’s ability to achieve the DFC for the Trinity Aquifer.

As Justice Hecht wrote in his concurring opinion in *Sipriano*, “what really hampers groundwater management is the established alternative, the common law rule of capture...It is hard to see how maintaining the rule of capture can be justified as deference to the Legislature’s constitutional province when the rule is contrary to the local regulation that is the legislature’s preferred method of groundwater management.”<sup>[xi]</sup>

The Legislature constructed Texas’ groundwater regulations to ensure that groundwater, a natural resource, is conserved, preserved, and protected.<sup>[xii]</sup> But the rule of capture is contrary to these purposes, especially when it protects the interests of corporate entities wishing to export groundwater rather than the property rights of local landowners.

In this era of drought and widespread regulation of groundwater in Texas, the doubt expressed long ago by Lord Wensleydale over the rule of capture’s protection of water marketers is even more relevant today. In response to the situation in Hays County, a Hays County Commissioner [recently wrote](#) that “[t]he rule of capture should not be the only rule that applies to a corporate entity with the intentions of commercial distribution of water resources.”

In the short term, locals are considering annexing the unregulated parts of the Trinity Aquifer into the jurisdiction of the Hays-Trinity Groundwater Conservation District and lobbying the Legislature for additional funding for the district to be able to effectively regulate. But in the long term, perhaps the Legislature should examine whether it is time to dispense with the rule of capture in favor of a liability doctrine that protects the natural resource, the property rights of all landowners, and supports the regulatory framework the Legislature enacted rather than undermining it.

### Footnotes

<sup>[i]</sup> *Houston Texas Central Railroad Company v. W.A. East*, 98 Tex. 146, 81 S.W. 279 (1904).

<sup>[ii]</sup> *East*, 98 Tex 146 at 150.

<sup>[iii]</sup> *Id.*

<sup>[iv]</sup> *Id.*

<sup>[v]</sup> *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999)

<sup>[vi]</sup> *Sipriano*, 1 S.W.3d 75 at 78 (discussing [Friendswood Development Co. v. Smith–Southwest Industries, Inc.](#) 576 S.W.2d 21 (1978)).

<sup>[vii]</sup> *Id.* at 79.

<sup>[viii]</sup> See [http://www.twdb.state.tx.us/mapping/doc/maps/GCDs\\_8x11.pdf](http://www.twdb.state.tx.us/mapping/doc/maps/GCDs_8x11.pdf)

<sup>[ix]</sup> See Tex. Water Code §36.108.

<sup>[x]</sup> Tex. Water Code §36.1071(a).

<sup>[xi]</sup> *Sipriano* 1.S.W.3d 75 at 81, 83. (Hecht, J., concurring).

<sup>[xii]</sup> Tex. Water Code §36.0015

[Electro Purification](#) [groundwater](#) [Hays County](#) [landowner](#) [natural](#)

[resource](#) [private water](#) [regulation](#) [rule of capture](#) [unregulated](#)

## Leave a Reply

Your email address will not be published. Required fields are marked \*

Name \*

Email \*

Website

Comment

POST COMMENT

*The Energy Center blog is a forum for faculty at the University of Texas, leading practitioners, lawmakers and other experts to contribute to the discussion of vital law and policy debates in the areas of energy, environmental law, and international arbitration. Blog posts reflect the opinions of the authors and not of the University of Texas or the Center for Global Energy, International Arbitration and Environmental Law.*

### Popular Tags

- Texas
- water
- drought
- energy
- fracking
- endangered species
- natural gas
- groundwater
- court cases
- conservation
- pollution
- TCEQ
- climate change
- LNG
- oil and gas