

# Protecting Water in the Texas Hill Country

By Jim Blackburn, Environmental Lawyer and TESPAs Board Member

*In this Explainer, legendary Texas legal expert talks about why Texas groundwater law amounts to not much more than "too damn bad" if your well goes dry and what TESPAs is doing about it.*

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Imagine the Texas Hill Country without water. No swimming holes. No beautiful valley vistas over clear, clean water. No seeps and springs.

Impossible you say? Maybe not, given the current race to mine groundwater that provides all our water supplies in the Hill Country. And if we don't get serious about protecting our private groundwater and our public rivers, we will lose both. Mark my words.



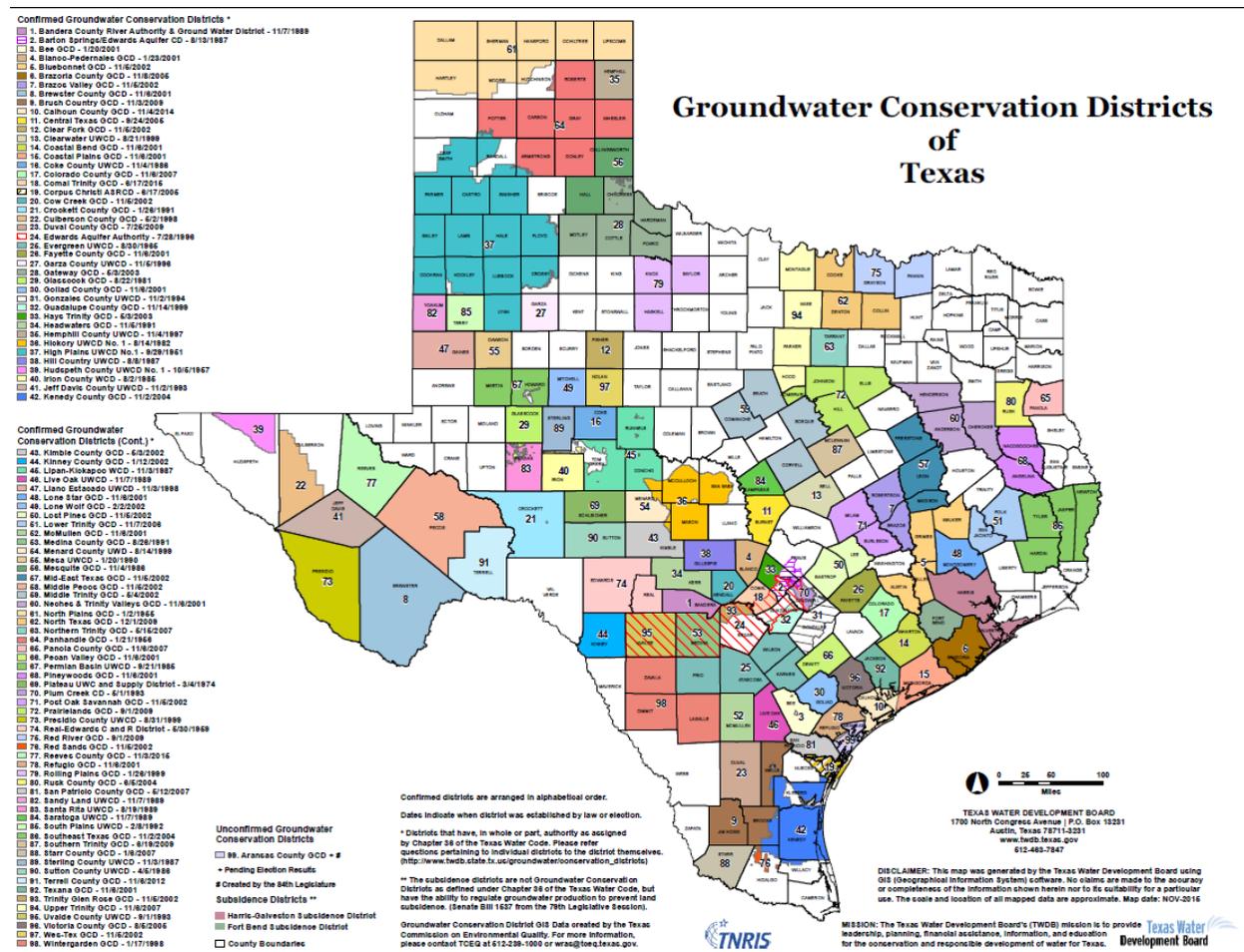
All of the major rivers of south central Texas rise in the Hill Country - the Guadalupe, the Blanco, the Comal, the San Marcos, the San Antonio, the Frio, the Sabinal and the Nueces as well as Cypress and Onion and many more creeks and springs. And they are all in danger of losing the groundwater sources that provide base flow to rivers and sustain us through droughts.

The problem is the piecemeal, haphazard and arguably schizophrenic manner in which the State of Texas protects groundwater (or not). For over a century, groundwater has

been subject to the rule of capture which means that you could drill a well and capture the water below your property. If you harmed your neighbor in the process, it was “*damnum absque injuria*” which means there is loss without injury or more eloquently stated, for the drained landowner it means too damn bad.

## GROUNDWATER DISTRICTS IN TEXAS

For decades, Texas has been creating groundwater districts to regulate groundwater withdrawals, in theory to protect one landowner from the negative effects of their neighbor’s wells. This effort started with the High Plains of Texas in the 1950s, then with controlling land subsidence in the Houston area in the 1970s and then expanded to the Edwards Aquifer. Today, there is a hodge-podge of groundwater districts that cover much, but by no means all, of the Texas Hill Country. The various water districts are shown on the map below in color. White areas have no groundwater district.



These groundwater districts are not the same. Each district has different funding sources, rules and guiding philosophies. Some have virtually no money for staff or studies. Others favor water use and even mining to support development, including the export of groundwater from within the district to rapidly developing urban areas. Some try to protect the water resource and the landowners. Yet these districts are the only dependable method for protecting our groundwater beneath our homes as well as protecting the seeps and springs that provide our base flows for the magnificent rivers of the Hill Country.

## **EAA v. DAY**

In the Hill Country, the Edwards Aquifer Authority (EAA) has done a very good job managing a very difficult situation. In the 1990s, a lawsuit was filed over the impact of water withdrawals from the Edwards on the springs in San Marcos and New Braunfels. This suit led to the creation of the EAA, and after a long and difficult negotiation, a plan was agreed upon for managing withdrawals and maintaining spring flows aimed at protecting endangered species in these springs. This plan is called a Habitat Conservation Plan (HCP) and was approved by the U.S. Fish and Wildlife Service in 2014. It is important because it provides the basic structure of the district's rules to protect the springs while reasonably regulating withdrawals, a tight balance in the best of times.

The jurisdictional reach of the EAA is limited with its boundaries extending in a long but rather narrow swath centered around San Antonio. The remainder of the Hill Country is covered by a hodge-podge of districts with very different rules and agendas. Most notably, there is no HCP – no central plan - for these other districts that requires protection of base flow of our creeks, streams and rivers as does the HCP. When permits seeking permission to withdraw a certain amount of groundwater are filed within a district, the extent of technical review and the applicable regulations will vary considerably from district to district.

The situation regarding these districts was made more difficult by the Texas Supreme Court in the case of *EAA v. Day*. In this case, the Texas Supreme Court ruled that groundwater districts could regulate withdrawals but that they also could be sued for an unconstitutional “taking” of property if the permit was too restrictive or denied. The prospect of being sued over these takings means that groundwater districts are very hesitant to deny permits or even limit the requested amount of withdrawal. If they do, they face the very real likelihood of being sued. And if they have no budget to hire lawyers, they likely will lose and be forced to either pay for the “take” with money they do not have or issue the permit. You can imagine that even the most willing regulator is given pause by this Supreme Court decision.

So, given this situation, the very real possibility exists that large amounts of groundwater will be permitted to be removed from our various aquifers that underlie the Hill Country. Those groundwater resources closest to the IH-35 corridor, the 290 corridor and the 281 corridor are likely at greatest risk, with those underlying Hays County being at the center of several major groundwater disputes, including the proposed Needmore Permit application as well as the upcoming of the Electro Purification application to sell water to development along the IH-35 corridor. If all of the pending permits were issued, water levels would drop several hundred feet beneath central Hays County, potentially affecting Jacob's Well, Fern Bank Springs and the Blanco and Guadalupe Rivers.

## **TESPA'S LEGAL PLAN OF ACTION**

In order to address these disputes, it is necessary for citizens to roll up their sleeves and fight for these resources. And it is going to be a Texas-size fight to protect the Hill Country's water. It is a task worthy of all of us who love the Hill Country. Here is a plan of action for these two proposals as well as others coming at us over the next several years:

Over two years ago a group called the "Trinity Edwards Springs Protection Association (TESPA)" was formed by Wimberley-area residents to take on the plan by Electro Purification to pump and sell up to 5.3 million gallons\_of groundwater per day to the Buda area. EP proposed to drill in an area that was generally thought to be outside of any district's boundaries, falling into a regulatory gap between the Edwards Aquifer Authority and the Hays Trinity Groundwater District which covers much of Hays County. TESPA filed a lawsuit in state district court in San Marcos trying to either have the court determine that it was regulated or seeking common law remedies for our protection, including attacking the rule of capture, a bad rule that needs to go.

TESPA dismissed this suit after the legislature passed HB 3405 which granted the Barton Springs Edward Aquifer Conservation District (BSEACD) jurisdiction over this area. And while EP has not moved forward yet to file a permit application, another applicant called Needmore Water LLC did file a permit application for about 800,000 gallons per day, supposedly to use for irrigation for ranching purposes on a 5000-acre ranch. Assuming one cow takes 15 gallons of water per day, that is enough water to support 10 cows per acre when most Hill Country ranches run one cow/calf per 8-15 acres.

## **NEEDMORE CONTESTED CASE – AND COSTS -- EXPLAINED**

Needmore applied for a permanent permit from the BSEACD, and TESPAs has requested a contested case hearing on that permit application which we plan to vigorously oppose. However, the impediments we are encountering are substantial. We requested that the District grant us a hearing before the State Office of Administrative Hearings (SOAH), an impartial body with professional administrative law judges. The District itself could have held the hearing, but most district board members do not have the legal training and expertise, so they refer it to SOAH for review and a recommended ruling by an administrative law judge.

When you ask for a contested case before SOAH, the Texas Water Code requires that the party requesting the hearing pay for it. This is financially hard on a citizen opposition group funded by donations, particularly when you are told it will cost \$30,000, which must be deposited before the hearing starts. So – to start with – we have to raise thirty grand just to be able to be heard before the judicial body with jurisdiction over this issue. Texas has an open courts constitutional provision that has found for indigents that a \$50 filing fee may be too much. We likely will argue in court that this “filing fee” at SOAH violates the Texas Constitution. By the way, when you request contested case hearings before the Texas Commission on Environmental Quality over matters within their jurisdiction, the requesting party does not have to pay for the hearing process, but only, on occasion, for a portion of the transcript costs.

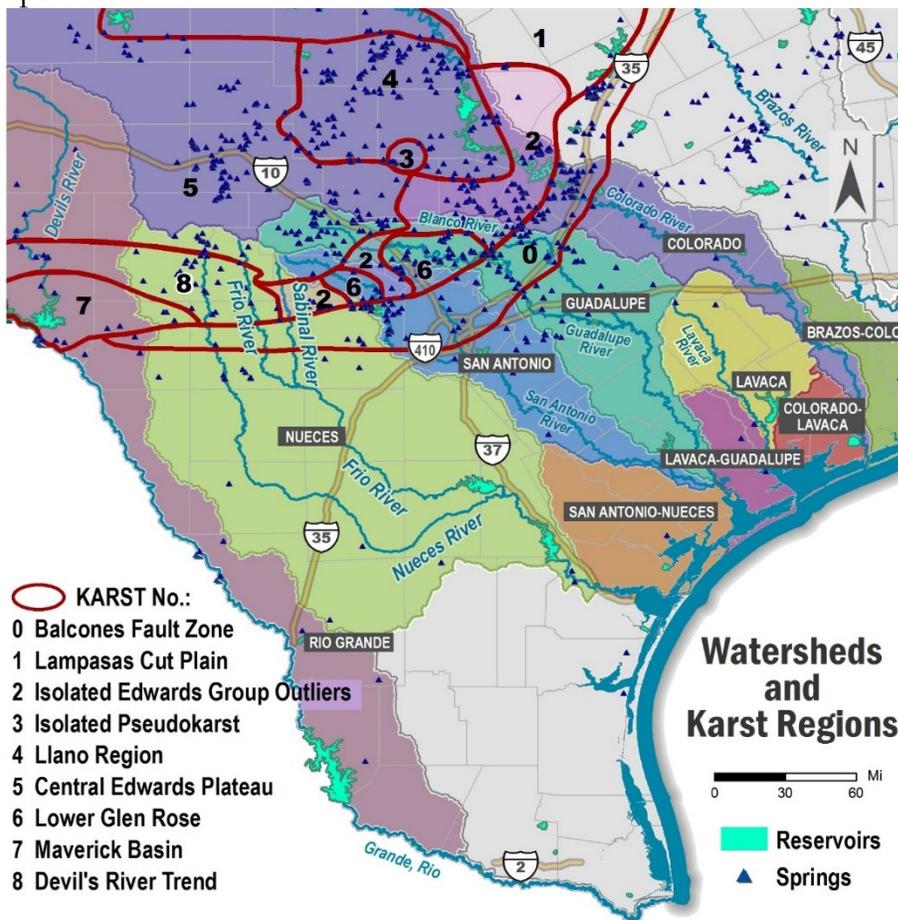
In order to fight, you have to raise money, and it seems like what is happening in Hays County is only the beginning of a litany of permit applications that will spread to wherever the groundwater exists. TESPAs is committed to do what it takes to raise the money it needs. What we have observed convinces us that this threat to Texas Hill Country water is very real. I don’t like to overstate environmental tragedies, but this could honestly turn into one.

## **THE LONG TERM PLAN**

Ultimately, TESPAs wants to work for a comprehensive and sustainable water plan for Hays County and Central Texas that promotes water conservation, quality, and sustainable use, while maintaining the ecosystem. This fight is not about one groundwater well. This fight is about the future of the Texas Hill Country.

At the center of this Hill Country-wide concern is water, springs and Karst geology. There is simply no other place in Texas with the geologic setting of limestone caves, cracks and fissures that is present in the Karst geology. It is no accident that this area is known for endangered species. The habitat is unique. The land is full of underground caves, bats, blind salamanders and cave spiders. And it is full of swimming holes, spring-fed creeks and rivers and beautiful country. In the map below, the area underlain

by Karst geology is shown. This is the area that, in the long term, should receive special attention and respect from all Texans. This the area that TESPAs is committed to trying to protect.



## WHAT YOU CAN DO TO HELP

The next time you drive by the Guadalupe in Kerrville, or the Blanco in Wimberley or the Frio or the Sabinal or Cypress Creek or even Barton Springs, think about those wonderful water resources being gone. If our groundwater gets sucked too hard, it will cease to give the gift of surface water that makes the Hill Country unique.

TESPA’s website can be found at [www.tespatexas.org](http://www.tespatexas.org). If you are interested in talking to us about issues in your part of the Hill Country (or Texas for that matter), please contact us. We ask you to consider joining us and making a donation.

But most importantly, if you care about the Hill Country, resolve to do something to protect it. It will be gone if you aren’t willing to fight for it.