

# Playing By The Rule

**Groundwater is covered by an archaic law that could leave us high and dry.**

by Joe Nick Patoski

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**WATER AND WHERE TO GET IT HAS BEEN AN OBSESSION** ever since humans arrived in the American West. People have searched, begged, lied, stolen, cheated, killed and been killed for it. Land has been seized, plundered and rendered useless because of it. Riverbeds, lakes and communities have been drained and abused and trivialized into detritus, remnants left behind in the pursuit of progress.

The process is still playing out, nowhere as dramatically as in Texas, where 21st century water wars are breaking out across the state.

In West Texas and the Panhandle, water marketers such as millionaire farmer Clayton Williams Jr., developer Woody Hunt, Denver billionaire Phil Anschutz and Dallas corporate raider T. Boone Pickens have plotted ways to move the precious commodity from rural areas to thirsty cities, lining their pockets all the way while ending farming as a way of life in the remote Dell Valley of West Texas and in Roberts County in the eastern Panhandle.

North of San Antonio, golf course developments and booming bedroom communities compete with small towns over water in the Guadalupe River. Along the border, farmers squabble with their counterparts in Mexico for their fair share from the Rio Grande. In Kinney County, the heart of Texas' artesian aquifer region, farmers are fighting each other over their rights to sell water. Caddo Lake—the only naturally formed lake in Texas, in the wettest corner of the state—has been the object of a historic tug-of-war between lake people and the nearby town of Marshall. Nueces Bay, and every other estuary on the Texas coast, is threatened by reduced freshwater in rivers because of increased withdrawals upstream.

Court dockets are backlogged with so many water-related suits, you might say they're waterlogged. Candidates for high office speechify about the problem but offer no real solutions. Lobbyists stuff their pockets in anticipation of a legislative session in which water will be one of the most serious long-term issues facing Texas.

Much of this fussing and fighting comes courtesy of the [Rule of Capture](#), an archaic piece of British common law carried to these shores. The Rule states that whoever owns a piece of property owns the water beneath it. The Texas precedent was set in 1843 in the case of *Acton v. Blundell*, when Texas was a republic and people were largely ignorant about the nature and movement of [groundwater](#). The Rule of Capture was upheld in 1861, when *Frazier v. Brown* was decided, and again in 1904 when the Texas Supreme Court heard *The Houston & Texas Central Railway Co. v. East* case. The court upheld The Rule by reasoning water below the soil was too “mysterious, secret, and occult” to regulate.

On the other hand, surface water—water you can see, such as rivers, lakes, and bays—belongs to the people of Texas, a doctrine most Western states apply to both surface and groundwater (See “Who’s Water Is It Anyway?”).

No state politician of power and influence has since dared to propose eliminating The Rule, even though Texas is the only state in the arid half of the United States to embrace a principle other states regard as foolhardy. About the best the Texas Legislature could muster to address this unequal use of the earth’s most precious resource was the 1949 declaration that groundwater districts were the preferred method for local communities to “conserve, preserve, protect and recharge underground water reservoirs.” Although districts have the power to space wells to minimize drawdown, if it comes down to legal hairsplitting, The Rule still has precedence. If you are lucky enough to have groundwater, it is yours to sell for a handsome profit.

Water is the New Oil in Texas. The winners and losers are still to be determined.

**MY OWN CURIOSITY ABOUT TEXAS’** quirky way of dealing with water began while wandering around a friend’s property a few miles northeast of Fort Stockton in that vague transition zone where the Permian Basin becomes the Chihuahuan Desert, and mesas turn into mountains. It began with a simple question about what appeared to be a sluice gate for a canal in a patch of overgrown desert. Fort Stockton, I quickly learned, was one of the early losers.

Fort Stockton is known largely as a major food-fuel-motel way-station along Interstate 10. But for most of its history, the reason for Fort Stockton’s being was Comanche Springs, once the most abundant spring complexes beyond the Balcones Fault. Native Americans relied on the springs for thousands of years during seasonal migrations. The Spanish explorer Cabeza de Vaca passed through there in 1534. Comanche and Kiowa tribes used the springs as a rest stop on their way to and from raids into Mexico every fall. All kinds of adventurers, soldiers, railway workers, outlaws, tradesmen and thieves relied on the springs for their long treks between the civilized East and the wild West.

The springs were named, according to several accounts, for the Comanche who was shot dead for trying to steal horses from Anglo travelers headed to California during the Gold Rush. His body lay by the springs for several years, which inspired the name Place Where the Comanche Thief Was Killed, ultimately shortened to Comanche Springs.

It doesn’t take a military strategist to know that the best way to subjugate people is to take away their water. So Fort Stockton was founded in 1859 as a military camp with the dual purpose of

disrupting traffic along the Great Comanche War Trail and protecting Anglo settlers. The fort was strategically located adjacent to the largest of several artesian springs. Guarding the springs hastened the demise of the Comanche, the Lipan, the Mesalero and every other band of nomads.

That allowed Anglo settlement, but not an end to fighting over water. When Pecos County was organized in 1875, its first legal case was a dispute over water rights. By that time, more than 6,000 acres in the desert were being cultivated thanks to irrigation water that flowed by gravity from the springs. Because of water, Fort Stockton thrived, becoming a major stop on the southern transcontinental railroad and a place to rest and refuel on major highway routes linking Florida to California and Mexico to Canada. Because of water, 108 families north and east of town lived on farms. They formed a water district so that the water could be dispersed equitably through an intricate network of canals and sluice gates. Grapes, apples, pecans and alfalfa flourished in this 9-square-mile Garden of Eden. People floated in inner tubes along the canals for up to 15 miles away from town. Visitors came to swim in the springs and picnic under giant cottonwoods along the Imperial Highway.

The town's biggest social event was the Comanche Springs Water Carnival, established in 1936 to commemorate Texas' centennial. Two years later, an elaborate, open-air pavilion was constructed around the pool to better showcase the pure, 72-degree water.

That was until 1951, when the Water Carnival was cancelled because there was not enough water. Earlier that year, 52 irrigation wells had been drilled 10 miles west of Fort Stockton on land owned by Clayton Williams Sr., his brother J.C. Williams, and several others. The wells were equipped with pumps powered by diesel engines to draw water from deep below the surface. They worked so efficiently that the flow of Comanche Springs slowed to a trickle within hours after the pumps started. The farmers east of town ran dry, but landowners west of town expressed no remorse. Under The Rule, they could have all the water they could pump because they owned the ground above it.

Geologists and hydrologists determined that Comanche Springs was fed by rainfall in the Glass Mountains, some 50 miles southwest of Fort Stockton. The rainfall drains through braided channels coursing through limestone deep below the surface before bubbling up as springs east of town. The wells drilled west of town intercepted that underground flow.

The Pecos County Water Control and Improvement District Number One filed suit in Texas courts on behalf of the 108 farming families it supplied with water, challenging the prodigious pumping by the new farmers.

On June 21, 1954, the Texas Court of Civil Appeals ruled in favor of Clayton Williams, et al. by upholding The Rule of Capture, agreeing with the landmark 1904 Texas Supreme Court decision that groundwater was too mysterious to regulate. The Texas Supreme Court affirmed the decision.

Sadly, a half century later, the courts and the legal system still embrace the mysterious, secret and occult. The Rule rules.

**CLAYTON WILLIAMS' SON**, Clayton Jr., may have learned to swim in Comanche Springs, but when it came to pumping water, business was business. He followed in his father's footsteps by continuing to pump groundwater to irrigate crops on the high Chihuahuan Desert. When Williams unsuccessfully ran for governor of Texas in 1990, Jan Jarboe of *Texas Monthly* asked if he thought Comanche Springs could flow again if he stopped pumping 41 million gallons of groundwater daily. "They might," he reckoned. "But I'm not going to do it. It's my land, and I have the right to use the water....I'm a businessman. I'm a cow man. I'm a conservationist. I didn't dry up those springs. I bought the land. It's mine, and if I didn't pump water, it wouldn't be worth anything."

Now Williams wants to repurpose his rights from farming to municipal use in order to pipe water to Midland, though the city hasn't shown any interest. He also wants to pump it to the proposed NowGen experimental "clean" coal power plant in Penwell, in which Williams is an investor. A 100-mile pipeline would be constructed by Williams' Fort Stockton Land Holdings through private property seized through the use of eminent domain.

The Middle Pecos Groundwater Conservation District has scheduled two hearings for Williams' application for late September and early October. Williams believes the pipeline is a win-win deal, as he related to the [Midland Reporter-Telegram](#) in March: "I went to Fort Stockton and told them I'd build a reverse-osmosis plant, process their water at cost, and pay \$2.35 million in property taxes to the school and \$1.45 million to the county. I'm only paying \$20,000 now, so that's a big bump. It would be more economic benefits and high-paying jobs. To me, it's not complicated. We live in the box of law."

Former Speaker of the House Tom Craddick tried to help Williams by introducing House Bill 4805 in April 2009 to create the West Texas Water Supply District on 20 acres near the Midland International Airport. The district was designed to give Williams his own private government agency to capture and sell his water.

The bill was greeted with loud howls of disapproval in Fort Stockton.

"This is not in the best interest of Pecos County," County Judge Joe Shuster testified to the House Natural Resource Committee. "There's not been an independent study of groundwater in Pecos County. It's disingenuous to say that this amount of water [extraction] would be safe for all parties." The Hidalgo County Commissioners Court, the Lower Rio Grande Valley Development Council, Laredo's mayor, and the eight-county Rio Grande Regional Water Planning Group have called for a moratorium on Williams' permit request until studies on groundwater flows, including water from the Pecos River watershed, and their impact on the Rio Grande are complete.

House Bill 4805 died in committee, but the fight is not over.

"It will be back before the Legislature in 2011, probably in a timelier manner and with more organized support," says state Sen. Carlos Uresti, a San Antonio Democrat whose district

includes West Texas. “Those of us who are committed to protecting the water must be vigilant during the interim, during the next session of the Legislature and the sessions after that.”

**WE'VE LEARNED A LOT** over the past 150 years, and what happens to groundwater is no longer mysterious or occult. In the Panhandle, scientists have studied the drawdown of the Ogallala Aquifer, the vast reservoir of groundwater that extends from Texas up the spine of the Midwest into Canada. The Ogallala provided abundant sustenance for farm crops in the region for more than 150 years. But so much water has been pumped out that no amount of rain can refill the aquifer to levels of 150 years ago.

Less than half of the aquifer’s capacity remains, and what’s left costs more to pump, making irrigated farming in the Great Plains a risky proposition. That didn’t stop T. Boone Pickens from trying to exploit the Ogallala. In the early 2000s, he made deals with neighboring landowners around Roberts County to form Mesa Water Inc., which would pump Ogallala water and ship it via pipeline to Dallas, or wherever the highest bidder happened to be. He couldn’t have done it without The Rule.

Pickens has not yet found a buyer willing to pay his price for water, or built a pipeline to deliver the water, but he nonetheless felt compelled to accuse three northwest Texas groundwater districts of trying to ruin his business. The three are among the 98 groundwater districts in Texas, which by law must have plans to assure a water supply that will last 50 years. Groundwater districts were reaffirmed as the preferred means of local control with the passage of Senate Bill 1 in 1997. The districts are among the few entities that can limit what the Rule of Capture allows.

One district, Hemphill County Underground Water Conservation District, located in the arid northeastern part of the Panhandle, and including some of Pickens’ property, has established some of the most stringent limits on the Ogallala by planning to leave 80 percent of what remains in the ground for 50 years. A healthy aquifer would ensure flows in the county’s creeks and rivers, including the Canadian River and the headwaters of the Washita River. George Arrington, a Hemphill County rancher who sold a percentage of his rights to Mesa Water, joined Pickens in a lawsuit in March against the Texas Water Development Board. Arrington and Pickens complain that the Hemphill district’s plan is unreasonable and that Mesa Water would be denied as much as 18,000 acre-feet of water annually (an acre-foot equals about 326,000 gallons), hindering Mesa’s ability to turn a buck. They want the conservation plan thrown out.

**PRIVATELY OWNED GROUNDWATER’S** connection to state-owned surface water, such as the [vanishing Rio Grande](#), is clear. The Rio Grande has been running dry below El Paso since the mid-20th century from intensive agricultural and municipal use in Texas, the Mexican state of Chihuahua, New Mexico and Colorado, and the damming of the river at Elephant Butte in southern New Mexico. Over the past 10 years, the Rio Grande has frequently run dry before reaching the Gulf of Mexico east of Brownsville.

Historically, the Rio Grande has been replenished with inflow from the Rio Conchos in Chihuahua, which joins the Rio Grande above Presidio in Southwest Texas, and by the Pecos River above Del Rio. Several dams were constructed in the Conchos watershed over the past 25 years, rendering that river's flow less dependable. This is where Clayton Williams' plan to export water runs into trouble, because his groundwater in the Pecos watershed feeds the Rio Grande, an international waterway.

“The idea to export water from a desert is just so insane that you would laugh if you were not so afraid that it will actually happen,” says Kirby Warnock, whose relatives farmed the now-arid land east of [Fort Stockton](#). “I mean, on the face of it, any proposal to export water from a county that only gets 13 inches annual rainfall should be shut down immediately, except for the ‘flat earth’ groundwater laws we have in Texas. I am hopeful that Mr. Williams’ proposal will finally spark some legislation to implement strong groundwater laws in Texas, and recognize that water is a shared resource.”

Neither the lakes constructed over the past century in Texas, nor the reservoirs below the ground that took thousands of years to fill, are satisfying the thirst of Texas’ growing population. Otherwise, Kinney County landowners wouldn’t be suing the local groundwater district for restricting the amount of groundwater they’d like to export. There wouldn’t have been the unsuccessful lawsuit filed by the San Antonio Water System against the Lower Colorado River Authority for canceling a \$1 billion dollar deal to sell Colorado River water to San Antonio. And there wouldn’t be water marketers such as End-Op making deals with the Guadalupe-Blanco River Authority to move groundwater from the Carrizo-Wilcox Aquifer southeast of San Antonio to nearby cities and suburbs. It’s also why almost every creek, spring, and river in Texas is showing signs of stress.

Those realities make the fence and cage surrounding Big Chief Spring adjacent to the pool in Fort Stockton all the more curious. The cage was put in place decades ago to protect swimmers from the powerful force of the spring flow, a force that is now gone. Since the springs went dry, the cage has become just a memento of what once was. Even if springs have no legal rights in Texas, maybe, just maybe, Clayton Williams Jr. will do the right thing, and pure water will once again gush out from this once-sacred ground.

We shouldn’t hold our breath.

*Joe Nick Patoski is working on two upcoming books, one about the Dallas Cowboys and the other on Texas' best stewards of the environment. This story is adapted from a project about water in Texas.*