

Who controls the water in West Texas? Battle over 'clear gold' bubbles to the surface - Correction Appended

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 Correction Appended

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**Byline:** Robert Elder Jr., AMERICAN-STATESMAN STAFF

### **Body**

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BRACKETTVILLE -- Jim **McDaniel** and Zachry Davis, farmers and friends in this West Texas county, plan to sell their water rights to supplement sagging crop prices and wring some growth out of a stagnant rural economy.

"I can assure you, it won't take much to beat the profits in farming," says Davis, a solidly built, 49-year-old Brackettville native. His lined face is youthful despite decades of ranch and farm work, a veterinary practice and six children.

Brackettville, the **Kinney County** seat, is one of the last green places in West Texas before you hit the vast Chihuahuan Desert. The abundant water that runs underneath Davis' and **McDaniel's** property -- part brush land, part irrigated farmland -- could help parched Texas cities meet future demand.

Willing sellers, potential buyers: It's what lawmakers envisioned when they rewrote Texas water law in the 1990s to address the geographic imbalance of supply and demand. The intent was to create a master plan, and a viable market, for the state's most valuable natural resource.

What has actually happened is far different.

The grand vision of a statewide water marketplace didn't reckon with the realities of local politics and two conflicting interests: farmers who want to protect water for their crops and landowners who want to cash in on water resources. The involvement of big-name investors from other parts of the state feeds suspicions that the water dealers are profiteers.

"These water marketers," says Don Hood, the disdain clear in his voice, "don't give a damn about the county. For them, it's all about hard greenback dollars."

"They'd pump us dry," says Hood, a retired oilman who serves on the **Kinney County** Groundwater Conservation District board.

But there are megabucks to be made selling water. The potential for profit has attracted big-time investors and big political names looking to exploit their legislative knowledge for profit. The boom mentality is like that in the oil patch early in the last century.

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Water isn't like oil, however, and experts say it will never be as valuable. Water is expensive to ship because pipelines will have to be built for most major projects. There's no stable market for water, because the price depends on how far away customers are. And, as in **Kinney County**, it's hard to convince people that their supply won't be affected by losing even a small amount.

In fact, the county's ground-water district, which largely controls the use of local ground water, has effectively shut down plans for exporting water.

The dispute has enormous implications for the state because there are a lot of places like **Kinney County** -- sparsely populated regions that have water to spare from aquifers.

If water development "doesn't work here, I'm not sure it will work anywhere in the state of Texas," says Dan Pearson, a lobbyist at HillCo Partners in Austin who represents some county landowners and investors. "I just hope we're smart enough that we don't scare off private capital" for the water business, he said.

### A sense of urgency

Despite the current gridlock, there's an urgency to water-development deals. Three droughts in the past six years have sent Texas cities scrambling to secure additional water. San Antonio is one possible customer for **Kinney County** water, as are Eagle Pass and Del Rio.

In Central Texas, the fast-growing city of Kyle faces stiff fines for exceeding its pumping limits from the Edwards Aquifer. Pflugerville residents will soon pay up to 35 percent more for water to pay for a pipeline carrying Colorado River water to the city.

Zach Davis' family settled in **Kinney County**, on the Mexican border, about 150 years ago. He says he never thought much about selling water until the City of Eagle Pass, 56 miles to the south, informally inquired about buying water from the county in the mid-1990s. Davis hired an Austin law firm to advise him on rights to the water beneath his land, which sits atop the Edwards-Trinity Aquifer.

A deal with Eagle Pass didn't materialize, but Davis' lawyers put him in touch with a group of investors that includes Austin real estate developers Richard Hill and Dick Anderson. "We just wanted options in the event we have the opportunity to market our water if the economics work," Davis says.

A number of partnerships eventually merged into the Native Valley Alliance, which is managed by WaterTexas, an Austin water-development company. The company's chairman is former Republican state Sen. Buster Brown, the author of a 1997 overhaul of state water law. Lynn Sherman, a former Lower Colorado River Authority executive, is president.

Investors include state Rep. Tom Craddick, the Midland Republican who is in line to become speaker of the Texas House. Craddick says he's trying to sell his stake to avoid any question of conflict before the legislative session in January.

Out-of-town investors have been an easy target for opponents of water deals, who portray them as big-city deal-makers out to plunder **Kinney County**'s natural resources. That rankles Davis.

"The idea that water marketers have descended on **Kinney County** -- that's bull," he says. "We initiated this. We have never been approached by so-called water marketers."

Some of the bad feelings stem from different approaches by marketers. A Kingsbury real-estate developer, Ray Smith, has leased water rights on a 9,900-acre ranch in the county and would like to ship water to San Antonio. But the San Antonio Water System has rejected any deal, which prompted angry public exchanges between Smith's partnership and San Antonio officials.

By contrast, Sherman, whose WaterTexas is handling Davis' land, is well-regarded in the county for his knowledge of water issues and their importance to rural communities.

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Sherman says he tells WaterTexas investors from the start that returns from any one project could take three to five years -- primarily because of the uncertainty in water deals, including transport costs. "Getting water to the markets is where all the risk is," Sherman says. "In oil, 90 percent of the risk is in finding the resource. In water, 10 percent of the risk is in finding and the rest in getting to the customer."

Haves vs. have-nots

Davis' land literally brims with pure ground water forced to the surface by powerful hydrostatic pressure -- what's called an artesian flow. The wells on his land don't need a pump; Davis just depresses a valve on the wellhead and thousands of gallons of water a minute rush out.

Jim **McDaniel** has a similarly powerful well on his farm that shoots water up through and above a 16-foot standpipe near his crops of cotton and milo.

"It's his land," adds Davis, nodding toward **McDaniel** as they walk toward the irrigated fields on **McDaniel's** 500-acre farm. "Whether he wants to use the water for irrigation or sell it to Del Rio, that's his business."

**McDaniel** and Davis are among just a handful of landowners in the county who have water to sell. That is the root of the opposition, **McDaniel** says: "There are not a lot of folks who will benefit. I think a lot of it is just jealousy."

The Groundwater Conservation District has been swimming in trouble since county voters approved the creation of the district and elected the seven-member board in January. The district is financed by a property tax.

In August, the district adopted rules designed to shut down water marketing. They limit pumping to 2.5 acre-feet, or 650,000 gallons, for each acre of land and limit exporting agreements to one year, which kills any chance of marketers selling a long-term, steady supply to cities.

The unintended consequences have been severe for local farmers. Justin Burk grows alfalfa on 423 acres in **Kinney County**, mostly to feed cattle on his 50,000-acre ranch in neighboring Val Verde County. He says his crop requires 6 to 8 acre-feet of water for each acre of farmland.

Burk has just finished the last cutting of alfalfa for the year. He will visit his bank in Del Rio next month to renew his loan. But he's worried about the outcome if he doesn't get assurance about how much water he can use.

The district rules, he says, "leave me in a holding pattern." Alfalfa is a perennial that can last four years; without water, it will die, and he'll have to replant an expensive new crop.

"He's truly caught in the crossfire of this district," says Burk's lawyer, Paul Terrill of Austin.

One ranch owner has sued the district. On Nov. 1, John Boerschig sued the agency in state district court after months of unsuccessfully trying to obtain permission to drill a well on his Evans U-Bar Ranch.

Not surprisingly, the district is spending much of its \$70,000 annual budget on lawyers.

Beyond the legal wrangling, there are other issues on the district board.

Zach Davis is a director, although he says he abstains from votes that directly affect his own water deal. If residents don't like how he handles his responsibilities, he says bluntly, "There's an answer -- vote us out."

Another director is Darlene Shahan, who also is the district's interim general manager -- dual responsibilities that wouldn't pass the smell test in most governmental bodies. The state, however, didn't apply conflict-of-interest provisions to ground-water districts. Shahan's husband, Tully Shahan, is the county attorney, and his brother-in-law is also a director of the ground-water district.

In creating the rules, the district carved out an exception to the pumping limits for wells drilled between Jan. 1 and Aug. 6, when the rules were adopted. As it happens, the Shahans, who own 16,000 acres, own one of only a

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handful of wells that were drilled during that time. They say the well is for irrigating their vast property and isn't a prelude for selling water, although some county residents suspect that could happen.

"The last thing we would do is couch these rules to favor us," Tully Shahan says.

'Clear gold'

Texas water law had not changed in a half-century until the mid-1990s, when a string of droughts convinced legislators to reshape the law to fit the state's rapid urban growth.

A 1997 law mandated the creation of state and regional water plans, encouraged the establishment of local ground-water districts, and strengthened the Texas Water Development Board's "water bank," a clearinghouse for water sales and transfer of rights.

The law also made it difficult to transfer surface water between regions. That provision made ground water ideal for marketing because it's relatively cheap. And under the Texas rule of capture, landowners can do what they want with the water under their land.

It wasn't long before some entrepreneurs began to see water as "clear gold" -- as it happens, the name of a 1999 water-law conference in Austin that Sherman helped organize.

In 1999, Roberts County landowner Salem Abraham, president of the Moody Land and Cattle Co., sold the rights to ground water under 72,000 acres to Amarillo. The city paid \$22 million for the rights and will spend \$70 million more, in today's dollars, to build a pipeline when it uses the water in 25 to 50 years.

Veteran oilmen were the among the first to secure ground-water rights, but most have been unable to nail down deals. Oilman Scott Carlson is general partner of a company securing water rights in and around Williamson County. But he is tangling with investors who want to oust him because he pleaded guilty in August to state charges of swindling two former employers out of \$1.9 million.

Retired corporate raider and energy tycoon Boone Pickens has acquired substantial water rights in the Panhandle, but no customers so far.

The early days of the oil and gas boom were chaotic, even bloody. But in the 1930s, the state started developing a system that defined each landowner's rights to the oil or gas beneath his land. This helped spread the wealth among landowners and gave investors a certain and steady supply of oil.

The water rule of capture does just the opposite, says Jace Houston, general counsel for the Harris-Galveston Coastal Subsidence District, a water conservation agency.

"The rule creates tremendous uncertainty because it does not create any defined property interest in the water while it is in place," Houston says. Water marketers can't be sure how many landowners they'll need to contract with to ensure a steady supply for customers.

The rule of capture -- unique to Texas -- doesn't protect a landowner from having water beneath his land pumped out by adjacent landowners who also have water rights.

In ***Kinney County***, as a result, some fear that their neighbors could sell off water before they ever get a chance to use it. There's also uncertainty about the recharge into the Edwards-Trinity Aquifer and the effects of water exports.

"I say, let science decide," Davis says. "Let's get a good study of water here and let that determine things."

WaterTexas offered to pay most of the cost of a hydrological study for the region and let the ground-water district choose an entity such as the U.S. Geological Survey to do the job.

The district wasn't interested. "We're not going to do anything to get into bed with water marketers," says Darlene Shahan.

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State water officials aren't surprised by the intrigue. Robert Mace, an assistant division director for ground-water availability modeling at the Texas Water Development Board, has a favorite line about the topic: Like beauty, ground-water availability is in the eye of the beholder.

"**Kinney County** is a classic example of that," he says.

[relder@statesman.com](mailto:relder@statesman.com); 445-3671

## Correction

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The sixth paragraph of this article has been changed for the record.

**Correction-Date:** December 2, 2002, Monday

## Graphic

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As demand for water increases, especially in urban areas, farmers such as Zachry Davis of Brackettville in West Texas are considering selling their water rights, tempted by the profits to be made. But other landowners criticize the proposal, saying few will profit from a practice that will deplete the water that fellow landowners also have a right to. // On Jim **McDaniel's** farm in Brackettville, the water from the Edwards-Trinity Aquifer is so plentiful that he doesn't even need a pump for his wells. The water naturally gushes to the surface, a phenomenon known as an artesian flow. // Darlene Shahan is both interim general manager and a board member of the **Kinney County** Groundwater Conservation District. Such dualities are not considered a conflict of interest under state law governing ground-water districts. // Lynn Sherman, president of WaterTexas, an Austin-based water-development company, speaks at a meeting of the **Kinney County** Groundwater Conservation District. 'Getting water to the markets is wher

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