

Water Regulation: Water Sales

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THERE WILL BE WATER

T. Boone Pickens thinks water is the new oil--and he's betting \$100 million that he's right

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Roberts County is a neat square in a remote corner of the Texas Panhandle, a land of rolling hills, tall grass, oak trees, mesquite, and cattle. It has a desolate beauty, a striking sparseness. The county encompasses 924 square miles and is home to fewer than 900 people. One of them is T. Boone Pickens, the oilman and corporate raider, who first bought some property here in 1971 to hunt quail. He's now the largest landowner in the county: His Mesa Vista ranch sprawls across some 68,000 acres. Pickens has also bought up the rights to a considerable amount of water that lies below this part of the High Plains in a vast aquifer that came into existence millions of years ago.

If water is the new oil, T. Boone Pickens is a modern-day John D. Rockefeller. Pickens owns more water than any other individual in the U.S. and is looking to control even more. He hopes to sell the water he already has, some 65 billion gallons a year, to Dallas, transporting it over 250 miles, 11 counties, and about 650 tracts of private property. The electricity generated by an enormous wind farm he is setting up in the Panhandle would also flow along that corridor. As far as Pickens is concerned, he could be selling wind, water, natural gas, or uranium; it's all a matter of supply and demand. "There are people who will buy the water when they need it. And the people who have the water want to sell it. That's the blood, guts, and feathers of the thing," he says.

In the coming decades, as growing numbers of people live in urban areas and climate change makes some regions much more prone to drought, water--or what many are calling "blue gold"--will become an increasingly scarce resource. By 2030 nearly half of the world's population will inhabit areas with severe water stress, according to the Organization for Economic Cooperation & Development. Pickens understands that. And while Texas is unusually lax in its laws about pumping groundwater, the rush to control water resources is gathering speed around the planet. In Australia, now in the sixth year of a drought, brokers in urban areas are buying up water rights from farmers. Rural residents around the U.S. are trying to sell their land (and water) to multi-national water bottlers like Nestle (BW--Apr. 14). Companies that use large quantities of the precious resource to run their businesses are seeking to lock up water supplies. One is Royal Dutch Shell, which is buying groundwater rights in Colorado as it prepares to drill for oil in the shale deposits there.

Into this environment comes Pickens, who made a good living for a long time extracting oil and gas and now, at 80, believes the era of fossil fuel is over. So far he has spent \$100 million and eight years on his project and still has not found any city in Texas willing to buy his water. But like many others, Pickens believes there's a fortune to be made in

slaking the thirst of a rapidly growing population. If he pumps as much as he can, he could sell about \$165 million worth of water to Dallas each year. "The idea that water can be sold for private gain is still considered unconscionable by many," says James M. Olson, one of America's preeminent attorneys specializing in water- and land-use law. "But the scarcity of water and the extraordinary profits that can be made may overwhelm ordinary public sensibilities."

THE BIGGEST PUMP WINS

Pickens, an Oklahoma native, geologist, and someone who calls himself the luckiest guy in the world, is the quintessential entrepreneur. He started as a wildcatter in 1956; three decades later his Mesa Petroleum was the largest independent exploration company in the U.S. But that's not how Pickens made a name for himself--it was his hostile bids, one after the other through the 1980s, for oil companies far more powerful, far wealthier than his own. Pickens thought they could do more for their shareholders. He never took over any of them. He did, however, push them into deals they might not have considered otherwise, which helped reshape the oil industry. He did, sometimes, make hundreds of millions when he sold his stakes. And shareholders did, often, benefit. He was briefly the most famous businessman in America, a corporate raider who always wished people would call him a shareholder activist.

By the mid-1990s, though, Pickens had fallen. After a brutal and expensive fight with Unocal, he gave up his raiding. He lost control of Mesa Petroleum after a series of financial and managerial miscalculations. He went through an expensive divorce from his second wife and retreated to his ranch. It was in the midst of this that he acquired a newfound regard for water as a commodity that should be bought, sold, and traded for the benefit of those who own it and those who can afford it.

In 1996 a local water utility made its first big purchase of groundwater rights in the Panhandle. The utility, known as the Canadian River Municipal Water Authority (CRMWA), bought nearly 43,000 acres of water, some of it just south of Pickens' ranch, for \$14.5 million. (Property owners in Texas, and elsewhere, can sell their water separately from the land above it.) That Roberts County would become the stomping ground for the Panhandle water wars was perhaps inevitable. Underneath it lies one of the world's largest repositories of water, moving slowly among layers of gravel, sand, and silt. The Ogallala Aquifer stretches from Texas to South Dakota and contains a quadrillion gallons of water--enough to cover the U.S. mainland to a depth of almost two feet. Yet the extensive irrigation necessary to grow corn, cotton, and wheat in west Texas has left the Ogallala nearly depleted in some places. It is not an aquifer that is easily or quickly replenished. But the land in Roberts County is unsuited for agriculture, and so the Ogallala there is largely untapped.

Since the early 1900s, groundwater use in Texas has been governed by what's quaintly called the rule of capture, otherwise described as the biggest pump wins. It lets landowners pump as much water as they can, even if doing so drains neighboring properties. This put Pickens in an uncomfortable position: If he didn't sell his water to

CRMWA, the utility could potentially suck some of it right out from under his ranch. So he tried. But "they told me to kiss off," he says. Kent Satterwhite, who was then assistant general manager, says: "Boone was fairly insistent that we buy his water. It made him mad that we didn't have the money to buy it." That was the first of several contretemps between Pickens and various local water authorities. Pickens next approached the city of Amarillo, which also had begun to acquire water rights in Roberts County. It wasn't interested, either, though it did purchase water from several other nearby landowners. "Amarillo was pissed off at me," says Pickens, who has a long and fraught history with the city. When Amarillo turned him down, Pickens felt surrounded. "I had to find a buyer for my water," he says, "or I was going to be drained."

LANDOWNERS DIVIDED

There's a saying in Texas: "Whiskey's for drinking. Water's for fighting." Pickens decided to fight. In 1999 he created a company called Mesa Water and began to accumulate water rights so he could strike a deal with another city altogether. The hell with Amarillo. Pickens was confident he could sell his water: The population of Texas was expected to jump 40% by 2020, mostly in urban areas one dry season away from drought.

Pickens' decision to get into the water business was regarded by some in the Panhandle as nothing more, or less, than a shrewd move by a man who knows the value of commodities. The economy of the High Plains region is based on people taking out the natural resources and selling them. If water that can't be used for farming ends up in the taps of city residents hundreds of miles away, that's fine. Pickens says he's buying stranded, surplus water that needs to be rescued. Kim Flowers, who runs an 8,300-acre ranch in Roberts County, speaks for many landowners when she says: "People can do with their water as they wish as long as they're not wasting it."

In all, Pickens, CRMWA, and Amarillo have spent about \$150 million to buy up nearly 80% of the water rights in Roberts County, undermining and outbidding one another along the way. One unsurprising effect of their competition is that the price of an acre of water has in some places doubled, to \$600. That's something in which Pickens takes pride. Much as he did in the 1980s, when he went after big oil companies he believed weren't doing right by their shareholders, Pickens now talks about creating value for Roberts County landowners. They make money from selling their water while continuing to live, run cattle, and hunt on their property. "I told them I was going to raise the value of the land, and I accomplished that. The landowners are all tickled to death. I made our water worth something. And anybody with any sense would sell it."

Not all Roberts County landowners wanted to do business with him, though. Pickens intended to pull water from an aquifer that is pretty much the sole source for the Panhandle, and that isn't refilled quickly, and sell it to a place like Dallas, whose water use is the highest of any city in Texas. This seemed ludicrous, even reckless, to some. C.E. Williams runs the Panhandle Groundwater Conservation District, which is responsible for managing the competing demands on the region's share of the Ogallala. He puts it this way: "As a district, we cannot pick and choose where the water goes. But

personally I am concerned. I have a son who is an irrigated farmer, and I have grandkids, and I want to make sure that they can conduct commerce when they want to."

Pickens has a way of dismissing the complexity of a situation, sometimes even the possibility of an opinion contrary to his own. In this case, any opposition to his plan from anyone who is not a Roberts County landowner, who is not essentially a shareholder in this venture, he deems irrelevant. Williams, he points out, doesn't himself have any property. "Water is a commodity," he says. "Heck, isn't it like oil? You have to come back to who owns the water. The groundwater is owned by the landowner. That's it." When it comes to potential buyers, Pickens cares about only one thing: how much they're willing to pay. "Do I care what Dallas does with the water? Hell no."

Republican State Representative Warren Chisum is a Roberts County rancher who owns 12,000 acres next to Pickens and sold his water to Amarillo in 2001. He would seem to be a natural ally. He's not. "My water will remain local," he says. "It's controversial to ship it out of the Panhandle. When we run out, we're done. The long-term value is to keep it here. That's contrary to what Pickens wants to do. It's his water. But he won't be here in 50 years."

In 2002, Pickens began approaching several of Texas' sprawling cities, all of which share one defining feature: Their populations are growing so quickly that they are constantly in need of new supplies of water. But with water, as with so much else, location is critical. And Pickens' water is far, far away from anyplace that might buy it. Pickens knew he'd have to build a pipeline, and to do so at anything resembling a reasonable cost, he'd need the power of eminent domain--the right of a government entity to force the sale of private property for the public good. Water utilities have that right. If Dallas agreed to buy Pickens' water, it could extend such authority to him. But Dallas deemed Pickens' price too high and declined to do a deal. So Pickens and his executives tried to create a Fresh Water Supply District--a government entity that would have that power. But they couldn't get it through.

Over the next several years, Pickens continued accumulating water rights and began to lease other land, this time with the idea of creating the world's biggest wind farm. "One of the great wind areas is right up where we are," says Robert L. Stillwell, Pickens' general counsel. "You can set it right on top of where the water is." And since, one day anyway, Dallas may well buy both, Mesa could use a single right-of-way for the water pipeline and the electric lines. In Roberts County there would be real economic benefits from the wind farm. "The wind is meant to sweeten the deal," says Representative Chisum. "The big money for Pickens is in the water."

It had been a decade since Pickens first realized the potential value of the water deposited eons ago in the sand below the High Plains. Now it was time to employ the one resource he hadn't yet used: his lobbying clout.

POWERFUL LOBBYING

In January, 2007, the Texas Legislature convened in the grand statehouse in Austin. The 80th session turned out to be very productive, and one person who kept busy during that time was J.E. Buster Brown, a former state senator and one of the most powerful lobbyists in town. Among Brown's clients is Mesa Water. "My job is primarily defensive," Brown says of his work for Pickens. "I'm watching to make sure there is no legislation passed that creates obstacles to Pickens doing what he wants to do. I'm supposed to make sure nothing bad happens."

Brown did more than that: He helped win Pickens a key new legal right. It was contained in an amendment to a major piece of water legislation. The amendment, one of more than 100 added after the bill had been reviewed in the House, allowed a water-supply district to transmit alternative energy and transport water in a single corridor, or right-of-way. "We helped move that along," says Stillwell. "We thought it would be handy and helpful to everyone."

After the bill passed, Tom "Smitty" Smith, Texas director of Public Citizens, an advocacy group, says several legislators were drinking coffee and reading through it. "Uh-oh," one said. They'd just realized the amendment would help Pickens build his pipeline. "Many legislators were watching for this play," Smith says, "and it still snuck by." State Senator Robert Duncan, a Republican who represents Lubbock, says: "It probably should have raised our suspicions, but we were moving a lot of bills. And it would have been hard to hold up this one even if we'd discovered the amendment."

Pickens still needed the power of eminent domain if he was going to build his pipeline and wind-power lines across private land. And by happy coincidence, the legislators passed a smaller bill that made that all the easier. The new legislation loosened the requirements for creating a water district. Previously, a district's five elected supervisors needed to be registered voters living within the boundaries of the district. Now, they only had to own land in the district; they could live and vote wherever. The bill, as it happens, was put forth by two legislators from Houston; Brown says he and Mesa had nothing to do with it. "That wasn't our bill," says Brown. "I wish I could take credit for it."

Pickens moved quickly to take advantage of the new rules. Over the summer of 2007, he sold eight acres on the back side of his ranch to five people in his employ: Stillwell, who resides in Houston, two of his executives in Dallas, and the couple who manage his ranch, Alton and Lu Boone. A few days later, Mesa Water filed a petition to create an eight-acre water-supply district with those five as the directors and sole members. On Nov. 6, Roberts County held an election to decide whether to form the new district. Only two people were qualified to take part: Alton and Lu Boone. The vote was unanimous. With that, Pickens won the right to issue tax-free bonds for his pipeline and electrical lines as well as the extraordinary power to claim land across swaths of the state.

No one at Mesa regards Roberts County Fresh Water Supply District No. 1 as an unusual arrangement. "We're no different from any other water or electricity supplier," says

Stillwell, meaning they, too, would use the power of eminent domain only as a last resort and for the public good. As for the suggestion that he wouldn't have qualified to be a board member under the old rules, Stillwell says: "It doesn't matter that I'm on the board. It would have been another me, just a local me."

"WE'RE NOT HAPPY"

Pickens was ready to reach out to landowners along the route. In April, 2008, Mesa sent out some 1,100 letters to people along the 250-mile proposed right-of-way, from Miami, Tex., to a town called Jacksboro, just short of Dallas. The letters included a Texas landowners' bill of rights, information on the condemnation procedure, a map of the route, and a list of open houses they could attend for more information.

One stifling evening in May, about 50 people showed up at the Twin Lakes Community Activity Center just outside Jacksboro. When the ranchers arrived, more than a dozen of Mesa's public-relations consultants, hydrologists, and land men were waiting for them. Standing behind tables laid out with pens, cups, hats, and bags with the District No. 1 logo, the officials were available to answer questions about the 250-foot-wide corridor Mesa would use to construct, maintain, and possibly expand the pipeline and electric lines. While this arrangement allowed everyone to get information specific to their property, it also precluded any public questioning of the Mesa standard-bearers. This did not go unnoticed by the ranchers. "We're not happy," said one. "Pickens is pushing his power trip on us. I can't fight his money. But if he asked first, I might have thought better of it." Another said: "Land goes way back for a lot of people here. If you tell people you want their land, Texans raise their guns." At the end of the evening, most of the pens and hats and cups still lay on the tables.

Pickens isn't bothered that by his invoking the right of eminent domain, Mesa has inflamed landowners up and down the route. "It always does," he says. Mesa expects to acquire the land it needs in the next 18 months and pay about \$30 million for it; Pickens wants to begin construction on the \$1.2 billion pipeline right afterward. It should take about three years to complete. If all goes according to plan, Mesa will be able to pump enough water to satisfy the needs of some 1.5 million Texans every day.

Pickens hopes to strike a deal with Dallas or the urban areas around it before Mesa starts building the pipeline. "Eventually they will need it," he says. So far, though, the talks might best be characterized as preliminary. "We continue to meet with Pickens' staff and engineers to get a better understanding of the proposal and so they can understand what our needs are," says Mike Rickman, assistant general manager of the North Texas Municipal Water District, which supplies water to 13 cities north and east of Dallas. "Mesa has a lot of water. But how much will it cost to buy it and deliver it?" Rickman says that at some point he would have to consider the consequences for the Ogallala: "Does it make sense to take water from an arid portion of the state? We don't want to harm our neighbors out there."

In Roberts County, people hold on to the hope that pumping from the Ogallala can be

controlled. In 1998, as Pickens and local water utilities began buying up water rights, the groundwater conservation district placed some restrictions on the rule of capture that it calls the 50-50 rule: Anyone who receives a new permit to pump can draw down the aquifer by only 50% over the next 50 years. Later, an additional limit of 1.2% per year was set. These essentially manage the depletion of the Ogallala under Roberts County; there, it is replenished at a rate of only 0.1% a year. Williams, who put the rules into place, says: "It's like taking dollar bills out of your bank account and putting nickels back in. Even with a big bank account, there's an end. That's pretty much what's happening in the Ogallala."

Pickens has promised to abide by the 50-50 rule. "I don't have any concerns about depleting the aquifer. All I'm doing is selling surplus water," he says. "I'm not about to drain all the water out of Roberts County. I have my ranch there. But I could sure take it down 50% and not hurt anybody. And it could make a lot of people a lot of money."