

## Texas Water Policy Options

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### Findings

- According to recent projections the state will need an additional 8.3 million acre-feet of water by 2060 to meet the demands of a population projected to increase from 25.4 million in 2010 to 46.3 million.
- Interbasin transfers can be a key strategy in meeting the state's water needs, but current regulations make this difficult.
- In some cases, regulation by Groundwater Conservation Districts has effectively prohibited new groundwater development.

### Introduction

Providing an adequate supply of water is a growing challenge for Texas. According to recent projections the state will need an additional 8.3 million acre-feet of water by 2060 to meet the demands of a population projected to increase from 25.4 million in 2010 to 46.3 million.<sup>1</sup>

Projections nearly 50 years into the future must of course be treated with some caution. But it remains true that if Texas is to continue to expand and grow, new water resources will have to be developed to meet this growing demand. And while Texas plans for enough water during a drought of record, that model may need revising. The drought of record refers to prolonged conditions over the decade of the 1950s. Yet, in 2009 and again in 2011, central Texas experienced a drought unprecedented in its intensity, with hydrological conditions worse than the historical drought of record.

To deal with this future water need, in 1997 the Texas Legislature passed SB 1, legislation setting forth a “bottoms up” approach to meeting the state's water supply needs. As required by SB 1, Texas has completed detailed water plans measuring available water supply and future demand. Strategies for developing this demand, however, are produced mainly at the local level with minimal state input. Sixteen Regional Water Planning Groups have developed comprehensive plans which the Texas Water Development Board (TWDB) compiled into a document known as the State Water

Plan.\* The TWDB issued its initial State Water Plan in 2002, with revised versions published in 2007 and 2012. In addition, Regional Water Plans identify hundreds of strategies to augment available supply by 9 million acre-feet of water by 2060.<sup>2</sup>

The 2012 State Water Plan estimates the capital costs for funding all the water management strategies recommended in the 2011 regional water plans at \$53 billion—though it is not clear that all of these strategies should be funded.<sup>3</sup> In response, there have been proposals to fund State Water Plan projects using everything from a disbursement from the state's Rainy Day Fund to a tax on bottled water.

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While these discussions about funding are important, they are not the only issue involved here. Even more important are the regulatory impediments to private financing of water projects. This private financing was the primary method contemplated for financing water projects by SB 1, which stipulated that “voluntary redistribution”

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\* Despite the name, the State Water Plan is technically not a state developed plan, but is a compilation of regionally developed proposals.

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of existing water supply would create much of the water needed for growing demand. In other words, to the extent possible, future water demand should be met by transferring water from areas where there is a surplus to where there is a deficit. Additionally, as regulatory impediments are removed increased efficiencies should significantly reduce the cost of increasing available water supplies.

### Regulatory Impediments to Private Financing of Water Development

Voluntary redistribution assumes a well-functioning water market which facilitates change of use (e.g. from irrigation to municipal use) and water transfers. Markets, however, depend upon defined property rights and predictable regulatory decisions. If private financing is not flowing to viable new water projects, we should look to remove any regulatory barriers that may be holding back development before committing state resources to the problem. Indeed, in recent years the Legislature has, perhaps inadvertently, passed legislation which complicates—rather than facilitates—new water supply projects.

For example, interbasin transfers have traditionally been a means of “voluntary redistribution” of water to deal with droughts or other water shortages. According to the State Water Plan’s projections, certain areas of the state are expected to experience greater water strains while others may have more water than they need. A transfer from a surplus region such as northeast Texas to a region like Dallas-Fort Worth, where water is scarce, could go a long way to relieving some of Texas’ water shortage issues.

In 1997, however, a “junior rights” provision was added to the Texas Water Code requiring that any portion of a water right involved in an interbasin transfer would lose its seniority.<sup>4</sup> This has proven to be a major disincentive for new transfers.<sup>5</sup> Changing this provision, however, has proven controversial, raising such questions as whether or how to compensate the basin of origin for the lost water.

Or consider the matter of water right amendments. As the nature of Texas’ water demands changes, it is only natural that water currently used for one purpose may be redirected to another purpose. The current process for amending a water right, however, can be laborious, even if the only change is the use to which the water is put and the new use is approved as a beneficial use under current law. And the legal question that remains unresolved is whether a water right amendment solely for a change of use is subject to a contested case hearing. Streamlining the process for water right amendments that only involve a change of use, could help increase private market transactions that would help match supply to demand.

Likewise, SB 2 in 2001 and HB 1763 in 2005 enlarged the authority of Groundwater Conservation Districts (GCDs) to limit private development of groundwater. GCDs have the power to impose pumping limits on wells and tract size, regulate the preservation of historic uses, articulate “desired future conditions,” and restrict permitting of groundwater withdrawals on the basis of “managed available groundwater” (MAGs).<sup>\*</sup> In some cases, these powers have been used to functionally prohibit new water development.

It is possible that the Texas Supreme Court’s recent decision in *Edwards Aquifer Authority v. McDaniels*<sup>6</sup> may provide some relief against some of the more onerous GCD regulations. In *McDaniels*, the Texas Supreme Court reaffirmed the existence of a real property right in the groundwater beneath a landowner’s property. Although the Court said this private property right was (in principle) compatible with GCD permitting authority, the Court also said there is a point at which regulation could become an unconstitutional taking of private property for which compensation to the landowner would be

<sup>\*</sup> Implementation for MAGs is still in process. As of this writing, the MAGs have not yet been developed nor has any permit been limited on the basis of a MAG.

required. Where a GCD has functionally prohibited new groundwater permitting, it is hard to see how this would not amount to an unconstitutional taking of property under the *McDaniels* decision.<sup>7</sup> Nevertheless, legal challenges to GCDs can be long, expensive, and highly fact specific. The exact implications of the *McDaniels* decision for groundwater development are not yet known.

## Conclusion

As Texas considers proposals for financing water projects, it needs to make sure that regulatory barriers to private water developments (like the ones mentioned above) are dismantled. This will help ensure that fund-

ing for water development projects will come from those who will benefit from the projects, and should not involve cross-subsidies either from one part of the state to another, or from one industry to another.

Ensuring an adequate water supply for Texas' growing economy and population is vital to maintaining the long term viability of the state. Solving the problem, however, cannot be achieved simply through more spending. It will be achieved, at least in part, by removing the regulatory barriers to the development of viable new water projects. Unless the state addresses the regulatory disincentives that currently exist, sufficient water development for the future will remain uncertain. ★

## Endnotes

<sup>1</sup> 2012 State Water Plan, Texas Water Development Board (Jan. 2012).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Texas Water Code §11.085(s).

<sup>5</sup> Ronald A. Kaiser, *Solving the Texas Water Puzzle: Market Based Allocation of Water*, Texas Public Policy Foundation (Mar. 2005).

<sup>6</sup> 55 Tex. Sup. J. 343 (2012).

<sup>7</sup> See Josiah Neely, *Edwards Aquifer Authority v. McDaniel: A New Day for Texas Groundwater Rights*, Texas Public Policy Foundation (Sept. 2012).

## About the Author



**Josiah Neeley** joined the Foundation in October of 2011 as a Policy Analyst for the Center for Tenth Amendment Studies and the Armstrong Center on Energy & the Environment.

Prior to joining TPPF, Josiah worked as an Associate for the firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana, specializing in Constitutional Litigation, and clerked for the Honorable Roger Vinson, a federal district court judge in Pensacola, Florida. He has a B.A. in Government and Philosophy from the University of Texas and a J.D. from the Notre Dame Law School.

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