BUYING and SELLING RIO GRANDE and RIO GRANDE TRIBUTARY SURFACE WATER in TEXAS

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I. INTRODUCTION

Existing surface water supplies, on the Rio Grande in Texas are over appropriated. Development of reservoir projects, with one exception[1], can no longer be depended upon to provide the necessary water supply to agriculture and municipal needs of people in view of the anticipated growth in population along the Rio Grande below Fort Quitman, especially in the reach of the River below Amistad Reservoir. Groundwater cannot be relied upon to supplement surface water in amounts necessary to meet this region's future water needs because of water quality issues.[2] Similar water supply issues exist in the rest of Texas, thus, there has been a shift in paradigm from reservoir development to water planning and management.

In the western United States it is generally recognized that water conservation and water marketing is a significant component of water management strategy, and reallocation of water rights.[3] Water marketing was made a part of Texas water policy by Senate Bill 1 (S. B. 1) passed by the State Legislature in 1997. S.B. 1 encouraged water marketing and voluntary reallocation of water as a significant element of the State's water plan § 16.051(d)(e), Water Code, V.T.C.A.[4] and regional water plans § 16.053(e)(4)(H). S.B. 1 instructs that the state and regional water plans ". . . shall make legislative recommendations . . . to facilitate more voluntary water transfers in the region," § 16.053(i). Amendments to § 11.0275 establishes a legal definition of Afair market value for a water right@ as the willing buyer/seller rule.

Water marketing is an efficient and fair method by which water supply can be shifted from one use to another, and reallocated to meet changing water needs. Water marketing is an expression of our free enterprise and property rights system and is incentive based.

Keeping this paradigm shift in mind, this paper intends to review the legal background of the current status of marketing of water and water rights on the Rio Grande below Fort Quitman, Texas, and report the extent of marketing and the voluntary transfer of water rights from agricultural / irrigation use to municipal / industrial use.

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[1] Brownsville Weir Project near Brownsville, Texas, on the Rio Grande a short distance upstream from the mouth of the Rio Grande at the Gulf of Mexico. The project is authorized under Texas law, and is still in development stage pending agreements to be reached with Mexico.

[2] Rio Grande Regional Water Plan (Region M, TWDB) included in the State Water Plan, 2007.

[3] For more in depth analysis, see *Texas Water Marketing in the Next Millennium: A Conceptual and Legal Analysis*, Professor Ronald A. Kaiser, Texas Tech Law Review 27:181 (1996).

[4] All state statutory references will be to the Texas Water Code unless otherwise noted.

II. LEGAL BACKGROUND - SETTING THE STAGE FOR WATER MARKETING AND TRANSFERS

A. The Setting

Law, politics and historical events has divided the Rio Grande into two segments: above and below Fort Quitman, Texas. This Paper deals with the segment below Fort Quitman, Texas. The Rio Grande below Fort Quitman, Texas, is further divided into three (3) segments for management and administration. The **"Upper Rio Grande"** runs from Fort Quitman down to Amistad Dam; the **"Middle Rio Grande"** runs from Amistad Dam to Falcon Dam; and the **"Lower Rio Grande"** runs from Falcon Dam to the Gulf of Mexico.

The ability to have surface water transactions and transfers is enhanced by identification of the owners of the water rights ("the players"), and quantification of the water rights owned. The surface water law in Texas is based upon the prior appropriation doctrine, but the manner in which rights were adjudicated in the Lower and Middle Rio Grande makes it different than the rest of the State, while the Upper Rio Grande is governed by traditional Texas law of appropriation (which, through the adjudication process, has merged common law riparian rights to form an appropriation type right).

The Lower Rio Grande water rights were adjudicated by the first and only court adjudication of water rights in Texas with litigation which began in 1950s and concluded with a final judgment in 1971.

The Middle Rio Grande adjudication later generally followed the court adjudication in the Lower Rio Grande in principle, and was the first administrative agency[5] adjudication of water rights in Texas. Later, water rights were adjudicated in the Upper Rio Grande as other water rights were adjudicated in the State based upon the prior appropriation doctrines.

Because of these circumstances, water transfers in the Upper Rio Grande is governed by Texas general surface water law, whereas, the water transfers in the Middle and Lower Rio Grande is a much easier process because it is managed as a unitized system. This situation, was created by different historical events, and has resulted in a different pattern of modern events. In the Middle and Lower Rio Grande there have been many water transfers, the buying and selling of water rights, for over 30 years. However, there have been no significant water rights transfers in the Upper Rio Grande. Only recently has there been a transfer of water rights from the Upper Rio Grande to the Middle Rio Grande, but no transfers have occurred between Upper Rio Grande water users. Commission rules prohibit water rights transfers from the Lower and Middle Rio Grande to the Upper Rio Grande.

[5] In this paper the Texas administrative agency involved was first the "Board of Water Engineers" under an Act in 1913, but later was changed by the Texas Legislature several times to what is now the "Texas Commission on Environmental Quality" (TCEQ), all of which is referred to in this paper as the "Commission."

B. Lower and Middle Rio Grande - Background

As already noted, water marketing transactions have been active for more than 30 years in the Lower Rio Grande in Texas below Falcon Reservoir because of the unique nature of the adjudication of water rights in the Lower Rio Grande and for 25 years downstream of Amistad Reservoir in the Middle Rio Grande because that adjudication merged the water rights into a unitized system.

Water marketing transactions have occurred elsewhere in Texas, particularly on the Colorado River, but have not been as plentiful as in the Lower Rio Grande.[6] This is due to the fact that the ability to have a surface water transaction in Texas is very site specific, and depends upon many different circumstances on each stream.

The unique circumstances on the Lower Rio Grande were brought about by the manner in which the state court adjudicated the rights in the reach of the River below Falcon. It was followed in basic concept in the agency adjudication of the rights in the Middle Rio Grande, between Amistad Reservoir and Falcon Reservoir and was the first Texas adjudication under the Texas Adjudication Act of 1967. In the reach of the Rio Grande above Amistad Reservoir to Fort Quitman the water rights were adjudicated later in a manner similar to other appropriative water rights in Texas.

Now, to some of the background. In 1944, agreements were reached between the United States and Mexico resolving claims to water in the Rio Grande below Fort Quitman. This culminated in the 1944 Treaty. The 1944 Treaty led to major federal developments on this segment of the Rio Grande. As these events were occurring, Texas suffered a severe drought in the 1950's in the Lower Rio Grande (and elsewhere in Texas). This resulted in the *Valley Water Suit* litigation among water rights claimants at the very end of the Rio Grande in Cameron, Willacy, Hidalgo and Starr Counties.[7]

In the 1944 Treaty, Congress authorized three (3) dams and reservoirs on the Rio Grande below Fort Quitman for flood control and hydroelectric power generation; but which also resulted in conservation of water in the reservoirs. In the Congressional authorization of these international dams, Congress provided that use of water from the reservoirs would be determined under State law. What resulted in time was the completion of two (2) dams - Falcon Dam and Reservoir in 1954, and Amistad Dam and Reservoir in 1968. This was occurring at the time that water rights were being adjudicated in the *Valley Water Suit*.

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[6] *Supra*, *Kaiser*, at 27:p. 184; and *Survey of Water Right Transactions - Public and Private*, Douglas G. Caroom and Susan M. Maxwell, 2005 Texas Water Law Institute, Austin, Texas.

[7] *The State of Texas, et al. v. Hidalgo County Water Control and Improvement District No. 18, et al.*, reported at 443 S.W.2d 728 (err. ref'd. n.r.e.)

These dams impacted the previous run-of-the-river water rights which then existed in the Lower and Middle Rio Grande. The reservoirs were constructed, at no cost to the Texas water rights holders. The dams interrupted the flow of the River, and changed the characteristics of the River. While doing so, the dams provided the benefit of storage and water conservation to those water rights holders downstream of the dams.

Accordingly, the courts, in agreement with the water rights claimants, and the Commission, modified the Prior Appropriation Doctrine, which had existed on the Rio Grande below Falcon, into a different system. Under the new system, water is allocated out of water stored in the reservoirs in accordance with the defined rights determined for irrigation with a distinction between Class "A" irrigation rights and Class "B" irrigation rights based upon a priority in the rate of allocation to the respective water rights based upon the ratio of 1.7 to 1 of water conserved in the reservoirs. This was an attempt by the courts to recognize the traditional Prior Appropriation Doctrine. On the other hand, municipal use rights were adjudicated, pursuant to requested water rights amendments to the underlying certified filing rights (Texas early appropriation rights) of many Valley water district claimants by the Commission during the course of the litigation. It was done through a stipulation of the parties which was approved by the Court. Under this stipulation, municipal users were stipulated to have a defined quantity of water per calendar year (based upon 1965 use) coupled with a 60,000 acre foot reserve in Falcon Reservoir set aside for municipal users in the final Court Judgment. This "defined quantity of water each year" was similar to that adjudicated irrigation users, but had other results which will be discussed below. Of course, water rights holders in what is now the Upper Rio Grande were not parties to this case and this stipulation.

Subsequently, the Commission adjudicated the rights of the Rio Grande upstream from Falcon Reservoir, and below Amistad Reservoir (the Middle Rio Grande). These previous run-of-the-river rights had likewise been impacted by the construction of Amistad Dam by that time. The Commission in those adjudication proceedings essentially adopted a similar water rights regime as was developed by the court in the *Valley Water Suit* that is, establishing Class "A" and Class "B" irrigation rights, and establishing a defined annual entitlement for municipal users backed by a reserve held in the reservoirs. Different from the Lower Rio Grande below Falcon Dam, however, the municipal use rights in the Middle Rio Grande were in most part, based upon legal claims based upon certified filings and permits as opposed to a stipulation entered into by the parties in the *Valley Water Suit* litigation.

Significantly, the Commission, which was not contested by the parties, determined that the Middle and Lower Rio Grande system should be administered as a single unit system. This was considered to be the most efficient and logical way in which to manage the waters conserved and stored in the federal reservoirs. Of course, water rights holders in what is now the Upper Rio Grande were not parties in this case.

C. Upper Rio Grande - Background

On the Upper Rio Grande as is true in all Texas rivers and streams, except the Middle and Lower Rio Grande, water rights were adjudicated by the Commission based upon the Prior Appropriation Doctrine. Under this regime, water is allocated during times of shortage based on their priority date (including riparian rights) - that is, "first in time, first in right." Under this

system, the available water flowing in the river is allocated during periods of shortage to individual water-rights holders based on the date order in which the water rights were acquired or originally granted by Texas, with the oldest water right being allocated its authorized share of water first, followed by the second oldest water right, and continuing on based on the seniority or "priority date" of the water rights. Under this system, some junior water rights holders may be partially or completely denied water during periods of water shortage if senior water rights users divert all of the available water. Under the Prior Appropriation Doctrine in Texas, the type of the use (municipal, industrial, irrigation, etc.) has no bearing on water allocations among the water rights holders; consequently, allocations during times of shortage are based solely on the priority date of the rights. As a practical matter, however, the system is based on the honor system or enforced by the courts unless enforcement is provided by a state watermaster.

Although outside the scope of this paper, it is noted that in the segment of the Rio Grande in Texas above Fort Quitman, the water rights have only recently been adjudicated under the Water Rights Adjudication Act of 1967. Ironically, from a historical perspective the Lower Rio Grande was the first and only court adjudication of water rights in Texas - the *Valley Water Suit*; rights in the Middle Rio Grande was the **first** adjudication of rights under the Water Rights Adjudication Act of 1967 in Texas; and the water rights on the Rio Grande above Fort Quitman is the **last** adjudication in Texas under the Water Rights Adjudication Act of 1967. This last historical fact was due to that segment's unique relationship to water rights claims in that segment in Texas to other water rights claims to the Rio Grande in New Mexico and Colorado.

III. APPLICABLE TEXAS WATER LAWS RELATING TO WATER TRANSFERS ON THE RIO GRANDE BELOW FORT QUITMAN

A. General

Applicable water laws and Commission rules play a significant role in structuring water and water rights marketing transactions in Texas, and on the Rio Grande.

In Texas, § 11.040 requires recording of a water rights conveyance and § 11.084 restricts the sale of a permanent water right unless the seller has a perfected right to appropriate water under a certified filing, permit or certificate of adjudication. Some Commission rules and policies have been the only guidance on methods of transferring and conveyancing a water right. Also, until very recently there have been only a few Texas court cases involving the conveyancing side of a water rights transfer transaction, and required amendments to existing water rights being transferred. There are still no Texas cases dealing with the necessary transactional documentation and the enforceability of such a transfer and documentation.

B. Surface Water Law in Texas

Until this year, there was little statutory and no court case authority available on the manner of how to formally change the terms and conditions of water rights required in water rights transfer transactions until the late 1940s when the court in *Clarke, et al. v. Briscoe Irrigation Co.,* 200 S.W.2d 674 (Tex.Civ.App.-1947) ruled that a holder of a permit acquired

after the passage of the 1917 Texas Constitutional Conservation Amendment (Article XVI, § 59a) could not change the place or purpose of use specified in the permit without the Commission's approval.

The Court, in so holding, however, carefully distinguished between permits, granted by the State after the 1917 Constitutional amendment, and filings and certified filings of appropriators under the posting provisions of the Texas Irrigation Acts of 1889 and 1895. With respect to these water rights, the court took the view that such water rights were vested rights, title to which carried with it as an incident of title the right to change the place and purpose of use at the pleasure of the appropriator without further approval. A permit, on the other hand, being granted by the State, had to be changed by the State. Thus, after 1947, a transfer of rights under a permit required Commission approval for a change in place or purpose of use, but **not** an appropriative right based upon filings under the early Irrigation Acts prior to the 1917 Conservation Amendment. Neither of these two cases, however, dealt with a desired change in diversion point which is often involved in many water rights transfer transactions.

The question of Commission approval of changes in place and purpose of use and amendments to certified filings and permits were not specifically addressed and required by the Commission's rules until 1964 (then Rules 605.1, 605.2, and 610.1, 610.2) over 15 years after the *Clarke v. Briscoe case*.

A few years later, the question of requiring the approval and changing the purpose and place of use by the holder of a certified filing was addressed by a Texas court in *Nueces County WCID No. 3 v. Texas Water Rights Commission*, 481 S.W.2d 930 (Tex.Civ.App.-1972). The court held, in agreement with *Clarke v. Briscoe*, that a certified filing holder could change the purpose and place of use without Commission approval. The court specifically distinguished the application of *Clarke v. Briscoe* involving a permit issued by the State from a case which involves a certified filing evidencing appropriative rights acquired under the posting system established by the Texas 1889 and 1895 Irrigation Acts.

The Texas legislature, in 1975, reacted to the *Nueces County case* by passing what is now § 11.122(a) and (c), which requires Commission approval of changes of place of use and purpose of use, point and rate of diversion, amount of acreage to be irrigated or other changes in terms of water rights under permits, certified filings, and certificates of adjudication. These are among the changes or amendments to an existing water right required in a water rights transfer. Until very recently, no reported court case considered this statutory provision in the context of a water marketing case where water rights are transferred on the same stream requiring changes in place and purpose of use and point of diversion. A most recent Supreme Court case[8] involving whether a Commission hearing is required when changing only the purpose of use is discussed below.

Senate Bill 1 passed by the Texas Legislature in 1997, amended § 11.122 by adding §

[8] *City of Marshall* and *Texas Commission on Environmental Quality vs. City of Uncertain, et. al.*, Cause No. 03-1111 (Texas Supreme Court Opinion delivered June 9, 2006) Motion for Rehearing overruled December 15, 2006.

11.122(b) which intended to narrow the requirements in amending existing water rights in a surface water marketing transaction. Prior to S.B. 1 in 1997, the Commission did promulgate guidance and implemented the "no injury rule," applicable in evaluating the impact upon other water right holders.

S.B. 1 added § 11.122(b) which reads as follows:

> Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.

This statute only covers amendments which do not request an enlargement of the water right, that is, the right to divert more water and/or at a faster rate of diversion. In other amendment cases involving a change in place and/or purpose of use and/or point of diversion the statute appeared to direct the Commission to authorize an amendment if the change in the water right:

> **. . . will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.**

This portion of S. B. 1 was an implementation of the policies favoring water marketing in other parts of S. B. 1, and was intended to facilitate required amendments in water marketing transactions.[9]

Prior to S. B. 1 the Commission had placed the "no injury" rule into rule form. Following S. B. 1 and in compliance with § 11.122(c), the Commission adopted new rules. In § 297.45, Texas Administrative Code (TAC) expanded the "no injury" rule to cases involving new water rights as well as amendments involved in water marketing cases. The Commission explained that the normal application of the "no injury" rule, that is, impact on other water right holders and the environment, was only changed by the S.B. 1 amendments to § 11.122(b) to the extent it ". . . is limited by the analysis of the 'four corners' doctrine." The Commission explained in adopting § 297.45(b), TAC

> . . . the commission is to compare the effect of the proposed amendment on other existing water rights with such effects from the full, lawful exercise of the water

[9] *The Future of Water Transfers and Marketing in Texas: Senate Bill 1 Impacts*, Suzanne Schwartz, Esq., Texas Water Development Board, CLE International, Texas Water Law Conference 1997.

> right prior to its amendment to determine whether the proposed change would impair another existing water right. If the existing water right can be fully exercised in accordance with all terms and conditions within the "four corners" of the existing water right so as to have the same impacts on stream flows as the proposed amended water right, then the proposed change could not, as a matter of law, impair other water rights.

This explanation recognized the intent of S.B. 1. However, not all of the rules adopted by the Commission recognized this "matter of law" concept contained in the preamble to the rules. § 11.122(b) which provided ". . . an amendment to a water right . . . shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment . . . of greater magnitude than under circumstances . . ." where the water right is considered fully used. However, the Commission rule limited the "matter of law" treatment to issues involving impact on (1) other water right holders and (2) the environment only. Although recognizing that § 11.122(b) limited the issues to be considered to these two issues, the Commission rules resulted in other issues be considered in amendment case as in issuing new water rights.

The rules did narrow the limited review provided in § 11.122(b), by including consideration of § 297.53, TAC *Habitat Mitigation*, § 297.54, TAC, *Water Quality Effects*, § 297.55, TAC, *Estuarine Consideration*, and § 297.56, TAC, *Instream Uses* which involved environmental issues. However, did not make such limitation in rules § 297.46, TAC *Consideration of Public Welfare*, and § 297.47 *Impact on Groundwater*. Thus, the Commission limited the "matter of law" treatment only with respect to issues dealing with impact on other water right holders and the environment.[10]

Recognition of the "four corners concept" does identify the amount of water associated with water rights which can be marketed, and the basis of analysis in amendment cases. Both used and authorized unused water may be marketed. It also narrows the consideration in dealing with issues of public welfare, groundwater impact and use since the impact analysis begins with the full use assumption. For example, in changing the purpose of use from irrigation use to municipal use which may result in a change in the pattern of use should not be an adverse impact. This contention is based on the argument that since municipal use generally contemplates a sustained need and diversion of water from month to month, as opposed to an irrigation use, where diversion occurs when crops are in need of irrigation depending upon absence of rainfall, then the change in pattern of use could be argued as being adverse to downstream users. This contention does not appear to apply after § 11.122(b) because by application of the "four corners" principle, an irrigation user could divert water from a stream in any pattern of use as he desires, including a sustained use. An irrigation water rights holder could divert water with crop patterns similar to municipal users. Therefore, this argument does not appear applicable because of § 11.122(b), unless the particular permit involved has terms and conditions requiring a particular pattern of use.[11]

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[10] Certain other requirements were also applied to amendment cases by separate statute, *e.g.* requirement of water conservation plans, § 11.121.

[11] However, these results do not occur with respect to interbasin transfers because under S.B. 1 amendments to § 11.085 focus is on "historical use" as opposed to the "four corners" approach.

The language in § 11.122(b) **"subject to meeting all other applicable requirements of this chapter for the approval of an application. . ."** was not considered by the Commission in these rules. It was thought that this language dealt with amendments involving interbasin transfers under § 11.085. Interbasin transfers require an amendment to the water right under § 11.122. However, under this specific provision, § 11.085, as amended by S.B. 1, the requirements are much broader and the amount of water subject to transfer out of the basin of origin is limited to that amount of water "historically used" under the permit, certified filing or certificate of adjudication for which the amendment is sought. Obviously, this is a different standard than the "four corners" standard in amendments to water rights within a river basin. *See*, § 11.085(k)(2)(f) in the S.B. 1 amendments.

It is further noted that § 11.122(b) does not apply to amendments to water rights where the amendment actually requests an increase in **". . . the amount of water authorized to be diverted or the authorized rate of diversion . . . ."** In this instance, the regular provisions of § 11.134, pertaining to the issuance of new permits, would apply as it should because, in essence, this is a **new** water right.

Very recently the Texas Supreme Court has now interpreted § 11.122(b) in a case dealing with the issue as to whether a contested case may be required in an amendment case involving a request to change the purpose of use of water rights evidenced by a certificate of adjudication. The Court seems to generally adopt the Commission's existing rules.

C. *City of Marshall and Texas Commission on Environmental Quality vs. City of Uncertain, et. al., Cause No. 03-1111* (Texas Supreme Court Opinion delivered June 9, 2006, Motion for Rehearing denied December 15, 2006)

In this case, the *City of Marshall* (Marshall) applied to the Commission in 2001 to change the purpose of use of its water rights from municipal use to industrial use so that it could supply untreated water for industrial use under applicable Commission rules defining "purposes of use." The City's application did not request a change in the amount of water appropriated or the rate of diversion so the standards contained in § 11.122(b) applied.

Marshall's water rights were evidenced by a Certificate of Adjudication (adjudicated under the Water Rights Adjudication Act of 1967) recognizing a permit that the City had received in 1947, authorizing it to divert 7,558 acre feet of water per year from Cypress Creek. This permit was later amended in 1956 to authorize an additional 8,442 acre feet for a total of 16,000 acre feet of water per year for municipal purposes (water diverted, treated and delivered as potable water). It was undisputed in the case that Marshall had never used more than one-half of its authorized amount of water. The purpose of this Application was to allow Marshall to supply some of its raw water (without treatment) under its water rights for industrial purposes to an industrial user.

Although, this case does not involve a water marketing case between a buyer and seller of the water rights itself, it is a type of water marketing in that it enabled Marshall to sell part of its water under its water rights to industrial users in addition to its potable water customers. The

Court's Opinion will have application to other amendment cases in water rights transfer transactions.

The Court concluded that:

> . . . while section § 11.122(b) significantly restricts the issues that may be reviewed in a contested-case proceeding, it does not altogether preclude one. Depending upon that particular amendment application, a hearing may be necessary to **allow the Commission to assess certain limited criteria other than the application's effect on other water-rights holders and the on-stream environment that the Legislature considered necessary to protect the public interest, including assessment of water conservation plans, consistency with the state and any approved regional water plans, and groundwater effects**. (Emphasis added.)

The Court construed the opening phrase mentioned above "*subject to meeting all other applicable requirements of this Chapter for approval of an application . . .* " to mean that the other requirements for a new permit contained in § 11.134(b)(1) *application and filing fees*; (3)(A) *intended for beneficial use*; (3)(C) *not detrimental to public welfare*; (3)(E) *consistency with Regional and State water plans* and (4) *avoids waste and achieve water conservation* of the Code are to be considered. Consideration of these issues is limited because of the plain language in § 11.122(b) mandatory authorization if the requested amendment ". . . will not cause adverse impact on other water rights holders or the environment on the stream of greater magnitude than [if the certificate were being fully used] . . . ." It seems that the Court accepted some of the Commission rules promulgated pursuant to S. B. 1, but not all of them.

At the time of this writing of this paper it is too early to tell what the impact of the Court's decision will have on water marketing transactions.

IV. SPECIFIC COMMISSION RULE PROVISIONS IN THE MIDDLE AND LOWER RIO GRANDE

By virtue of the unique situations which came about by the *Valley Water Suit* and the Commission's adjudication determination in Middle Rio Grande Adjudication under the Water Rights Adjudication Act of 1967, approved by the Court, the rules with respect to these reaches is different than in the Upper Rio Grande, and the rest of the State.

Some of the legal principles are brought about by the *Valley Water Suit* adjudication and Commission adjudication and rules discussed above. In this respect, the Commission has adopted rules which govern these reaches of the River.

In 30 TAC § 303.41 regarding the sale of water rights it is provided as follows:

> (a) The owner of a water rights may convey his water right . . . (subject to rules previously discussed) . . . . The purpose and place of use shall not be changed without authorization form the commission. Owners of water rights shall promptly inform both the executive director and the watermaster of any transfers of water rights. The new owner must file with the executive director all required documents as identified in § 297.83 of this title (relating to Recording Conveyances of Water Rights).
>
> (b) If a tract of land to which a smaller water right acreage is appurtenant is owned by more than one person in divided interests, a water right partition agreement is required among all the owners of said tract of land before any one of the owners can be authorized by the watermaster to divert water. However, if the owners fail to submit a water right partition agreement within one month after being notified by the executive director that such an agreement is needed, the executive director shall administratively divide the water rights among the owners on a prorata basis by acreage. The owners involved may request that the executive director grant an extension of the one-month deadline, not to exceed six months, if extenuating circumstances exist. If the executive director does not grant the extension, the division will be made on a prorata basis. The executive director will recognize the prorata shares until changes are made by valid partition agreement.

Normally, in a sale or transfer of water rights there is a need to change the place of use plus other elements of a right, this requires an amendment to the certificate of adjudication or permit (if issued after an adjudication). As regards the Middle and Lower Rio Grande, Commission rules provide in 303 TAC § 303.42 regarding amendments that:

> The commission will consider applications to amend water rights.
>
> (1) An applicant shall submit to the executive director an application prepared to reflect the desired change(s) and executed as provided in these sections. Applications must meet all of the requirements for an original water permit as set out in Chapter 295 of this title (relating to Water Rights Procedural) and Chapter 297 of this title (relating to Water Rights, Substantive).
>
> (2) Determination of the type of notice required will be made by evaluating the applications according to § 295.158 of this title (relating to Notice of Amendments to Water Rights). One exception to this is that changes in the purpose of use, rate of diversion, and place of use of water rights held in and transferred within and between the mainstems of the Lower Rio Grande, Middle Rio Grande, and Amistad Reservoir will not require mailed and published notice.

The Commission rules prohibit a transfer of water rights from the Lower and Middle Rio Grande to above Amistad Reservoir in 30 TAC § 303.42(3) as follows:

> (3) Transfer of the point of diversion or place of use of water rights from the Lower and Middle Rio Grande to above International Amistad Reservoir are prohibited; however, transfers may be made between the mainstem of the Lower Rio Grande and the mainstem of the Middle Rio Grande.

Recognizing the different Texas surface water laws applicable to the Upper Rio Grande as relates to the Middle and Lower Rio Grande, the Commission has implemented the following rule dealing with water transfers from the Upper to the Middle and Lower Rio Grande in 30 TAC § 303.42(4) as follows:

> (4) Transfers of the point of diversion or place of use of water rights from the Upper Rio Grande into the Middle and Lower Rio Grande below International Amistad Reservoir will be prohibited unless:
>
> (A) an applicable conversion factor has been approved by the commission;
>
> (B) the commission finds that the transfer would not impair other water rights within the Middle and Lower Rio Grande; and
>
> (C) the commission finds that the transfer would not reduce the amount of water available for allocation.

A. Lower and Middle Rio Grande

With the above legal background and specific Commission rules applicable to these reaches of the River in mind, water right transfers and marketing are much simpler in the Lower and Middle Rio Grande than they are in the Upper Rio Grande and the rest of the state.

The water rights are administered and allocated in a unitized reservoir system in the Lower and Middle Rio Grande. Issues dealing with place of use, change of point of diversion, and transportation losses (which are absorbed on a system wide basis) are not factors which harm the environment, other water right holders or public interest consideration so amendments are granted without notice. Transfers may be made within each reach or between the main stem of the Lower Rio Grande and the main stem of the Middle Rio Grande. In the Lower and Middle Rio Grande the Commission rules provide that amendments to water rights, required in a water right transfer, can be made without mailed and public notice. However, transfers from the Lower and Middle Rio Grande to above Amistad Reservoir in the Upper Rio Grande are prohibited.

When the point of diversion and place of use are changed between the Middle and Lower Rio Grande, or vice versa, no harm can be done to other water right holders or the environment or affects the public interest at this point in time. However, in changing the purpose of use a conversion factor is applied because of the higher priority of use accorded municipal use in the Middle and Lower Rio Grande.

B. Upper Rio Grande

There has not been any case involving a water rights transfer within the Upper Rio Grande. There has been at least one transfer which dedicated the water rights to the Texas Water Trust for environmental flow purposes.

There has been one case of a water rights transfer from the Upper Rio Grande to the Middle reach under 30 TAC § 303.42(4) quoted above. This case involved the transfer of 8059.00 acre feet of very old priority rights near Presidio, Texas, to Maverick County, Eagle Pass, and Laredo in the Middle Rio Grande. This transfer was approved by the Commission, but was appealed by Lower Rio Grande water rights holders.

It is currently pending in the Appeals Court of Travis County, Docket No. 03-06-00690CV; *Brownsville Irrigation District, Bayview Irrigation District, Cameron County Irrigation District No. 6, Hidalgo and Cameron Counties Irrigation District No, 9, and Valley Acres Irrigation District vs. Texas Commission on Environmental Quality, Presidio Valley Farms, Inc., Maverick County, City of Laredo, and City of Eagle Pass Water Works System* filed in December, 2006.

This is the first case which involves a water rights transaction between buyers in the Middle Rio Grande, and a seller of water rights in the Upper Rio Grande. In this case, a water right holder in the Upper Rio Grande (the Prior Appropriation segment) requested to transfer its water rights to new points of diversion downstream in Middle Rio Grande below Amistad Reservoir. The case involves transferring a run-of-the-river right in the Upper Rio Grande through the storage rights system in Amistad Reservoir to the Middle Rio Grande. In its application, Presidio Valley Farms, requested an amendment to its water rights which changed the place and purpose of use and point(s) of diversion of its existing water rights. It is thus covered by § 11.122(b) because no increase in appropriation of water or rates of diversion is requested. The Commission granted the requested amendment with numerous special conditions due to the circumstances in the case. The protestants appealed the case to District Court, which affirmed the Commission's decision, and now is pending in the Appeals Court.

There has been one upper irrigation water right dedicated to the environment and the Trans Pecos Water Rights Trust is endeavoring to encourage water right holders in the Upper Rio Grande to donate and transfer to the Water Trust their water rights on a contractual lease basis or a permanent basis.

V. CURRENT STATUS OF WATER TRANSFERS ON THE RIO GRANDE BELOW FORT QUITMAN

The Final Judgment in the *Valley Water Suit* in 1971, and the Final Judgment in the *Middle Rio Grande Adjudication* in 1981, adjudicated approximately **135,980** acre feet per annum of municipal and industrial domestic use rights in the Lower Rio Grande and **43,290** acre feet of rights in the Middle Rio Grande. Since then, and to date, there have been irrigation rights converted to municipal use rights in these two reaches of the River of **106,224** acre feet in the Lower Rio Grande, and **21,536** acre feet in the Middle Rio Grande for a total increase in

municipal rights of **127,760** acre feet. This includes over 5,000 acre feet transferred to the Middle Rio Grande from the Upper Rio Grande in the *Presidio Farms* case discussed above. This has reduced Class "B" irrigation rights by **96,503** acre feet and Class "A" irrigation rights by **139,250** acre feet in the Lower and Middle Rio Grande for a total reduction of **235,753** acre feet. Or stated in terms of irrigated acres, approximately **94,300** acres.

In the Upper Rio Grande, there has been one transfer to environmental use from agricultural / irrigation use, and the one pending case transferring 8039 acre feet of agricultural / irrigation use to municipal / industrial use from the Upper Rio Grande to the Middle Rio Grande.

The future is yet to be determined based upon the impact of the *City of Marshall* case, and the impact of the *Presidio Farms* case involving transfers from the Upper to the Lower and/or Middle Rio Grande. Based upon transportation losses determined in the *Presidio Farms Case*, and reliability factors, it does not appear that many water rights from the Upper Rio Grande can be economically transferred either within the Upper Rio Grande or downstream, however selected cases may be viable. Water transfers within the Lower and Middle Rio Grande will occur, but the terms and conditions of such transfers will depend upon the desires and strategies of the stakeholders, and politics involved which is an ongoing process.

VI. SUMMARY

On the Rio Grande in Texas, the total impact of S.B. 1, the rules adopted by the Commission, and policies of the Texas Water Development Board upon water marketing has not yet been determined. The results of the recent *City of Marshall* case are not yet apparent. It could make the amendment process lengthy and costly. Other current Texas water law issues such as reuse and environmental flows are still complicating water management on the Rio Grande and in the State. It is believed, however, that in time these circumstances will be resolved and will have a positive effect on the evolution of marketing of surface water. The impending issues will also involve conjunctive use and the impact of groundwater development on surface water rights.

The Texas legislature, the Texas Supreme Court, and Regional and State Water Plans have recognized and established that water marketing and the voluntary reallocation of our water supply is a significant component of the desired water management needed in the future because it encourages water conservation and the most efficient use of water. It is also a fair method by which water supply can be shifted from one use to another and reallocated to meet changing water needs in the state. These political and judicial actions will lead us to an accommodation of Rio Grande water rights, and the water needs of our irrigation users and municipal users in the future.