LEGAL ISSUES IN SURFACE WATER TRANSACTIONS

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I. INTRODUCTION

Existing surface water supplies, in most river basins in Texas, are over appropriated and development of reservoir projects can no longer be depended upon to provide the necessary water supply to the anticipated growth in population in the state. Groundwater supplies are also finite, and groundwater cannot be relied upon to supplement surface water in amounts necessary to meet the state's future water needs. Thus, Texas is shifting it paradigm from reservoir development to water planning and management.

Water conservation and water marketing is recognized as a significant component of water management and reallocation of water rights in the western states, and now in Texas.[1] 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.[2] 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 "fair market value for a water right" as the willing buyer/seller rule.

In cancellation proceedings, a new defense to cancellation is if the water right is ". . . currently being made available for purchase through private marketing efforts. . ." § 11.177(b)(6).

The Texas Water Bank laws were amended by instructing the Texas Water Development Board (TWDB) to administer the ". . . water bank to facilitate water transactions . . ." § 15.702; and that the bank act ". . . as a clearinghouse for water marketing information including water availability, pricing of water transaction, environmental considerations, and potential buyers and sellers of water rights. . ." § 15.703(a)(8). It created the Texas Water Trust within the Texas Water Bank to hold water rights dedicated to environmental needs and instructed the TWDB, Parks and Wildlife Department, (PWD), and the Texas Natural Resources Conservation Commission (TCEQ) to adopt rules governing the ". . . process for holding and transferring water rights," § 15.7031(b), and added as an authorized function of a water project ". . . the acquisition of water rights," 15.001(6)(A).

Water marketing encourages water conservation and is the most efficient use of water and is 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. Water marketing is an expression of our free enterprise and property rights system and is incentive based.

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

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

This paper deals with observations regarding surface water transactions within the same river basin. Interbasin transfers involve similar but more complex issues beyond the scope of this paper.

Water marketing transactions have been active for more than 30 years in the Lower Rio Grande because of the unique nature of the adjudication of water rights in the Lower Rio Grande downstream of Amistad Reservoir. Water marketing transactions have occurred elsewhere in the State, particularly on the Colorado River, but have not been as plentiful as in the Lower Rio Grande.[3] This is due to the fact that the ability to have a surface water transaction is very site specific, and depends upon many different circumstances on the individual streams which vary from river to river in the State.

II. BASIC CONCEPTS AND TERMINOLOGY

A. What is Being Transferred?

At the outset, it is important to distinguish between the **marketing of water** and the **marketing of water rights**. The marketing of water is the sale of a *specific volume of water* for use over a period of time. I generally referred to these transactions as "wet water" sales, or "leased water." The marketing of water rights is the sale and conveyance of the *right itself* to take and use water from a particular source of supply on a permanent basis, or possibly, over a period of years. A permanent water right is considered an easement attached to property and a real property right. A conveyance of a permanent water right may be recorded in the same manner as any other instrument conveying an interest in land. *See*, § 11.040. These transactions are referred to as "paper water rights" transactions where the "water right" itself is involved.

The ownership of a water right entitles one to take and use water from a source of supply and can be sold and transferred; or the right of use of the water entitlement generated by the water right, that is "the water" may be sold on a contractual basis for a specific term or permanently.

A third separate category is a "water service right" which is the right to receive water from a supplier normally a water district or a supply contract with a water district or river authority. Whether such rights are subject to market are dependent upon the local circumstances, rules and contracts involved.

A determination of *what is being marketed* is the first step in structuring a transaction.

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[3] *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.

Privately held irrigation water rights may be transferred incident to the sale of the land on which they are used and appurtenant, or they may be severed and transferred apart from the land. Such severed water rights and publicly held water rights and water held by water corporations or other authorized agencies who supply water to others or the public do not attach to land and must be conveyed by separate conveyance, 31 TAC § 197.81, and normally require an amendment to the certificate of adjudication or permit which evidences the water rights, § 11.122. Because of the correlative nature of water rights, it is more difficult to transfer an interest in water compared to other forms of property. In general in the western states there have been three basic barriers to the transfer of a water rights: (1) per se rules in states other than Texas against the severance of water rights from the land to which the water was originally applied, (2) the necessity to protect the interest of third parties and (3) the difficulty of establishing just what water is for sale, *i.e.*, that which has been used in the past, or unused water under a water right, or both, especially in states where water rights have not been adjudicated.

B. Terminology

The terminology used in water transactions will vary from place to place and depending upon site specific factors which are involved. Again, a distinction should be made between a transaction involving a transfer of water as opposed to a water right. A water transfer may be a transfer of a specific volume of water or water allocation, or water unit in the context of a storage situation or a diversion of water for a period of time or quantity metered water in a natural surface water flow situation. Terminology used in documentation involved in these situations may be **contracts, leases, rental agreements, options** or the like. When the water right itself is transferred **deeds, conveyances, partitions of water rights, options, exchange, assignment, dedication, subordination**, are terms and instruments often used to structure the transaction.

The transactional aspect of a water transfer is similar to a real estate transfer. Where it naturally differs is that, except for the case where private surface water rights are appurtenant to land and passes with title to the land, a surface water right is normally severed from the land (place of use) and moved elsewhere, and normally the point of diversion and place and purpose of use may need to be changed by amending the certificate of adjudication or permit evidencing the water rights which is involved in a transaction. It is in this respect that a water rights transaction differs from a normal real estate transaction in that the terms and conditions of the water right, which need to be changed, require approval by the Texas Commission on Environmental Quality (TCEQ).

III. APPLICABLE WATER LAWS

Applicable water laws and regulations play a significant role in structuring water and water rights marketing transactions within a watershed. Water marketing is directly addressed in statutes in some of the western states. Statutes specifically cover water banks and the matter in

which a water transfer can take place. Federal legislation pertaining to specific projects may also provide methods by which the projects water can change hands.

In Texas, § 11.040 regarding recording of a water rights conveyance and § 11.084 which restricts the sale of a permanent water right unless the seller has a perfected right to appropriate water under a certified filing or permit, and some TCEQ rules and policies have been the only guidance on methods of transferring and conveyancing a water right. Also, there are only a few Texas court cases involving the conveyancing side of a water rights transfer transaction, that is, dealing with the necessary transactional documentation and the enforceability of such transfer of documentation (see cases cited in the annotations, § 11.040).

Understanding the state's water law is required in structuring water rights transactions. A general review of these laws has been covered by others at this seminar and only laws which are applicable in a marketing context will be discussed here.

A. Surface Water Law

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 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 Constitution Conservation Amendment (Article XVI, § 59a) could not change the place or purpose of use specified in the permit without the Board of Water Engineer's approval (a predecessor to the TCEQ).

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 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 was 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 water agency 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 water agency approval of changes in place and purpose of use and amendments to certified filings and permits were not specifically addressed and required by the TCEQ's predecessors 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 the 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 1889 and 1895 Irrigation Acts.

The legislature, in 1975, reacted to the *Nueces County case* by passing what is now § 11.122(a) and (c), which requires TCEQ 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. No reported court case has 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.[4] A most recent Supreme Court case[5] involving whether a TCEQ hearing is required when changing only the purpose of use is discussed below.

Senate Bill 1 passed in 1997, amended § 11.122 by adding § 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 TCEQ's predecessor did promulgate guidance and implemented the "no injury rule," applicable in evaluating the impact upon other water right holders.

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[4] There is currently pending in the 261st District Court of Travis County, Cause No. D-1-GN-06-000840; *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 March, 2006, which is the first case after passage of S. B. 1 which involves a water rights transaction between buyers and a seller water rights. In this case, a water right in the Upper Rio Grande is being transferred to new points of diversion downstream in Middle Rio Grande below Amistad Reservoir. It involves transferring a run-of-the-river right in the Upper Rio Grande, *see*, 30 TAC § 287.44(b), to the storage rights system in the Middle Rio Grande which requested an amendment to the water rights which changed the place and purpose of use and point(s) of diversion of the existing rights, and is thus covered by § 11.122(b) because no increase in appropriation of water or rates of diversion is requested. The TCEQ granted the amendments with numerous conditions due to the circumstances in the case. The protestants have appealed the case to District Court. place and purpose of use and point(s) of diversion of the existing rights, and is thus covered by § 11.122(b) because no increase in appropriation of water or rates of diversion is requested. The TCEQ granted the amendments with numerous conditions due to the circumstances in the case. The protestants have appealed the case to District Court.

[5] *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) at the time this paper was prepared was subjection to Motion for Rehearing.

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 right, that 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 TCEQ 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 intended to facilitate required amendments in water marketing transactions.[6]

Prior to S. B. 1 the predecessor to the TCEQ had placed the "no injury" rule into rule form. Following S. B. 1 and in compliance with § 11.122(c), the TCEQ adopted new rules, and § 297.45, expanded the "no injury" rule to cases involving new water rights as well as amendments involved in water marketing cases. The TCEQ 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 the analysis by the "four corners" analysis. The TCEQ explained in adopting § 297.45(b) ". . . 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 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

[6] *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.

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 TCEQ recognized this "matter of law" concept contained in the preamble to the rules. Section 11.122(b) is clear that ". . . 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 was fully used. However, the TCEQ rule limit the "matter of law" treatment to issues involving impact on (1) other water right holders and (2) the environment only, and did recognize that § 11.122(b) limited the issues to be considered to these two issues, and not other issues involved in issuing new water rights.

The rules recognize the limited review provided in § 11.122(b), § 297.53 *Habitat Mitigation*, § 297.54 *Water Quality Effects*, § 297.55 *Estuarine Consideration*, and § 297.56 *Instream Uses* which involved environmental issues. However, they do not make such limitation in rules § 297.46 *Consideration of Public Welfare*, and § 297.47 *Impact on Groundwater*. Thus, the TCEQ rules apparently relying on the introductory language in § 11.122(b) "subject to meeting all other applicable requirements of this Chapter" limits the "matter of law" treatment only with respect to issues dealing with impact on other water right holders and the environment.[7]

Recognition of the "four corners concept" even as limited by the TCEQ rules does identify what water can be marketed. 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 irrigator 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.[8]

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

[8] 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 this amendment **"subject to meeting all other applicable requirements of this chapter for the approval of an application. . ."** applies to amendment that involve interbasin transfers under § 11.085. Interbasin transfers require an amendment to the water right under § 11.122. However, under another 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. Moreover, § 11.1271 also requires submission of water conservation plans in amendment cases. It has been argued that this "subject to" language also applies to the administrative provisions dealing with the need for an application, filing fee, etc. in § 11.124(b)(1). Thus, there same administrative provisions in § 11.134 of the Code which administratively apply, but otherwise § 11.134 pertaining to new water rights seemed to be controlled by § 11.122(b).

It could be 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.

Thus, the application of §11.122 to all surface water rights as they currently exist – *i.e.*, permits, certified filings, and certificates of adjudication – was clarified. Also, the standard to be considered by the TCEQ with respect to not only permits, but also certified filings and certificate of adjudication, which would include riparian rights.

Very recently the Texas Supreme Court 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.

B. 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)

In this case the *City of Marshall* (Marshall) applied to the Texas Natural Resources Conservation Commission (TNRCC)[9] 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. 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 recognizing a

[9] Now the TCEQ, who issued an Amended Certificate in the case.

permit that the City had received in 1947, authorizing it to divert 7,558 acre feet of water per year from Cypress Creek, which 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 current Opinion will have application to other amendment cases in water 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.

The Court construed the opening phrase "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] . . ."

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. A Motion for Rehearing may be filed in the case.

IV. MARKETING FACTORS

Water marketing occurs and transactions are structured in various forms depending upon existing factors, some of which are:

1. **Source of Supply** – whether surface water, groundwater or a combination of both is involved, reclaimed or reused water

2. **Location** – place of current use and place of intended use; and related location of diversion(s) point(s)

3. **Purpose of Use** – whether the existing use and intended use is for municipal, industrial, irrigation, agricultural, environmental, or other beneficial use

4. How **water is taken** or diverted from the supply source – whether water is pumped or diverted by gravity and at what diversion rate

5. **Method of Distribution** – that is, is water taken by the ultimate user or by a facility for later delivery to the ultimate user

6. **Parties** – public or private

7. **Enforcement** – protection accorded the right by existing legal authorities, watermaster, mechanisms or entities in the place of current use and intended use

8. **Impact** on other water right holders and environment – the effect that the water transfer will have on other water right holders and the environment; consideration of priority of intervening surface water rights holders applying the full use assumption of § 11.122(b)

9. **Consistency with Regional and State Water Plans**

10. **Beneficial Use of Water** – is new use a beneficial use

11. **Avoidance of waste and achievement of water conservation** – at the new place of use

12. **Water Bank** – could the Texas Water Bank play a part in the transaction

13. **Water Trust** – can the Water Trust be involved

14. Applicable **Water Laws** – how does the surface or groundwater law relate and impact the transaction; and rules of the TCEQ and underground water conservation districts which are applicable

15. **Time to complete transaction due to regulatory requirements** – will contested case be involved

16. **Transactional Costs** – which maybe incurred in TCEQ proceedings, and possible court proceedings

17. **Market Value** – how can the value be determined.[10]

Changing the place of use and point of diversion are critical points in a transaction due to the impact this change on the stream. Normally, this may require a hydrologic study as to the effect the change will have on water rights holders, the environment, and other issues that may be involved. Water availability computer programs can be useful in identifying the impact the change will have.

Obviously, the above cannot hope to cover all possible factors to consider in a water marketing transaction because many are unique raising difficult issues to be considered.

V. FACTORS FAVORING WATER TRANSFERS

A. Identification of the "Water Rights" Marketed

With respect to surface water, the Water Rights Adjudication Act of 1967 has provided a means by which surface water rights have been adjudicated, "quantified" and defined so that an identifiable water right can be defined and analyzed for transfer.

Section 11.084 requires that a surface water rights seller have a perfected water right under a permit or certified filing or presumably a certificate of adjudication. Certainly, security in the ownership of a water right is vital to water marketing. The certainty brought about by the adjudication process, has laid the basis for water marketing in Texas in surface water rights. The adjudication process quantified the extent of a water right and gave it a "perfected" status as opposed to "claimed rights" status. Although, perfection of water rights was recognized in a particular factual situation in a few court cases, (such as *Clarke v. Briscoe* and *Nueces County WCID cases* discussed below) and legal opinion held that use under an early filing or permit constituted perfection, a judicial "determination" of perfection offers considerably more comfort

[10] As noted above, new § 11.0275 added by S.B. 1 provides a legal definition for the term "fair market value for water rights" it provides that ". . . fair market value shall be determined by the amount of money that a willing buyer will pay a willing seller, neither of which is under any compulsion to buy or sell, for the water in an arms-length transaction and shall not be limited to the amount of money that the owner of the water right has paid or is paying for the water."

to one acquiring a water right from another in a water marketing context. The adjudication process in Texas has provided that certainty.

B. Enforcement

The degree of enforcement mechanisms which are available to protect the transferred right and its enjoyment by the purchaser after the transfer is significant. The watermaster in the Lower and Middle Rio Grande below Fort Quitman on the Rio Grande, the South Texas watermaster in central Texas, and on the Concho River watershed around San Angelo enforce water rights which gives the purchaser the security needed that if the rights are purchased, they will be protected. On other streams in the state, without watermasters, S.B. 1 provided for penalties and other enforcement techniques by the TCEQ. Also, the existence of river authorities and water districts in the river basin involved provide enforcement mechanisms that may fulfill this need.

C. Transfer Process

Potential sellers and buyers must be assured as to what rules apply to the transfer process and what can be expected. Potential sellers in the surface water areas have been reluctant to commence proceedings before the TCEQ not knowing with all certainty as to what to expect in such amendment proceedings. Previously, § 11.122 only required that when a change in place of use, purpose of use, or point of diversion is desired that an amendment to the water right must be obtained from the TCEQ. Section 11.122(b) added by S. B. 1 intended to add certainty to the amendment process in some water marketing transactions.

VI. SUMMARY

The total impact of S.B. 1, the rules adopted by the TCEQ, and TWDB 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 on are lengthy and costly. Other current water law issues such as reuse and environmental flows are still complicating water management 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 in the state.

The legislature and the Texas Supreme Court 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, and is 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.