THE RIO GRANDE FROM FT. QUITMAN TO THE GULF:
WATER RIGHTS AND NEEDS IN THE LOWER RIO GRANDE
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Glenn Jarvis, Esq.

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I. THE SETTING: AN OVERVIEW OF THE AREA

The Rio Grande is a stream of contrast, not only in the usual sense of a stream beginning high in the mountains and ending in coastal lowlands where it empties into an ocean, in this case, the Gulf of Mexico, but in other ways as well. As the River flows through the State of Texas, it marks a contrast of cultures since it is the international boundary with Mexico on the south bank and Texas on the north bank. It flows through territories having contrasting economies from the urban and manufacturing center in El Paso to vast distances of arid desert ranching downstream from Ft. Quitman and Presidio, to irrigated farming, commercial development, tourism, maquiladors, and urbanization in the border area as it flows through Del Rio, Eagle Pass, Laredo to the Rio Grande Valley and to the Gulf of Mexico.

A. River from Ft. Quitman to Gulf

The Rio Grande, as we know it in Texas, is divided in two segments. The first is the shorter upstream segment, which flows from its entrance into the State near El Paso to Ft. Quitman and the second is the much longer Lower Rio Grande segment, thousands of River miles from Ft. Quitman downstream to the Gulf of Mexico. The Lower Rio Grande is substantially an independent stream. Since the closing of Elephant Butte Dam, all of the available Rio Grande water supply of the Lower Rio Grande emanates downstream from Ft. Quitman. The River is fed by the major Mexican tributaries, Rio Conchos and Rio San Juan, and the Pecos and Devil's River on the U.S. side.[1]

The construction of Amistad Dam near Del Rio and Falcon Dam, located between Laredo and McAllen, has divided the Lower Rio Grande into three reaches.

Upper Rio Grande Reach - Ft. Quitman to Amistad Reservoir
Middle Rio Grande Reach - Amistad Reservoir to Falcon Reservoir
Lower Rio Grande Reach - Falcon Reservoir to the Gulf of Mexico

B. Dams and Reservoirs

There are two major dams and reservoirs on the Lower Rio Grande: Amistad Dam at Del Rio, and Falcon Dam near Zapata between Amistad Dam and the Gulf. There is also Anzalduas Dam near Mission, whose primary purpose is the diversion of the Mexican share of the water at that point into the Mexican Anzalduas Canal. Further downstream in Hidalgo County is Retamal Dam, which is a smaller diversion dam, whose purpose is flood control and the diversion of River floodwater into Mexico.

[1] Attached for reference as Appendix "A" is Drainage Basin map from the Rio Grande Watermaster, Texas Water Commission.

The primary purpose of Amistad and Falcon Dams is flood control. However, the Dams are also used for hydroelectric production, recreational and of much importance to the Middle and Lower reaches for water conservation purposes. Amistad and Falcon Reservoirs contain the principal source of water supply of the Middle and Lower Rio Grande reaches. All structures on the Lower Rio Grande are under the control and jurisdiction of the International Boundary and Water Commission (IBWC). However, rights to the use of the waters in the Lower Rio Grande are determined by Texas state water laws.

There is a pending Application being considered by the Texas Water Commission (TWC) requesting a State permit to construct an additional on-channel dam downstream from Brownsville for the purpose of conserving water that would otherwise flow into the Gulf and the authority to expand the use of Anzalduas Reservoir as a water conservation facility. This proposal is controversial among water right holders in the Lower Rio Grande Valley because of water quality and administrative problems which will be created, and among environmentalists who fear environmental damage by the dam construction and interruption of instream flows in the River.

C. Economy of the Region

The upper Rio Grande reach lies in the most arid portion of Texas. Its economy is based substantially upon ranching and agriculture, with El Paso as its commercial and industrial center. As the River flows below Amistad Dam through the Middle Rio Grande reach, one encounters ranching in the Del Rio area and irrigated farming in the Eagle Pass and Laredo areas of over 200,000 acres, and manufacturing and commercial development and the growing maquiladora program. As the River flows below Falcon Dam into the Lower reach and the Lower Rio Grande Valley of Texas, one enters tropical Texas where extensive irrigated agriculture, tourism, commercial and industrial development abounds.

In the Lower Rio Grande Valley there are over 800,000 acres of irrigated farmland and dryland farming currently producing the great portion of agricultural products produced in Texas. The Valley produces the great majority of fresh vegetables produced in Texas, which is ranked third in the U.S. in vegetable production behind California and Florida. The Valley also produces cotton, grain, cattle, sugar and is famous for its citrus industry. A new and growing food industry is mariculture in the form of large shrimp farms in the coastal area and there are also greenhouses and nurseries.[2] The Valley is a highly urbanized area with over 600,000 people on the U.S. side and a larger number across the Rio Grande in Mexico. It is reported, for example, that the McAllen-Edinburg-Mission MSA in Hidalgo County is the fastest growing market in

[2] *See*, *Texas Agriculture Report*, Office of the State Comptroller, (Fiscal Notes, May, 1990).

Texas, with a projected population of 444,400 in 1994, followed by the Laredo Area in fourth place with a projected population of 141,500 in 1994.[3]

The maquiladora[4] industry has had tremendous growth in recent years. During 1990, Mexico streamlined the maquila approval process, and its economic revitalization programs have stimulated the growth of the maquiladora industry. By late 1990, there were over 1,885 maquiladoras in Mexico and along the Mexico border, employing more than 530,000 people. The number of maquiladoras is expected to continue to grow. Maquiladoras have replaced tourism as Mexico's second largest source of income.

In the Lower Rio Grande Valley today, there are 165 maquiladors across the border manufacturing all types of goods, including televisions, seat belts, electric motors, tennis shoes, automobile components and even expensive cast ceramic works of art. Some of the maquilas provide simple assembly and others virtually manufacture a finished product from raw materials. Also referred to as the "Twin Plant Program," many of the Mexican maquilas have sister operations on the U.S. side.

One of the more unique maquilas is located in Reynosa, across from McAllen. It is unique in the sense that it is heavy industrial ("smoke stack") as opposed to manufacturing. It is a foundry operation where raw material enters the plant to be transformed into completed brass faucets like ones found around the home. Its 400 workers manufacture an estimated 200,000 brass valves from 115,000 pounds of brass each week. Just a few of the most recognizable maquila corporate names that are found in the Valley area are AT&T, Converse, Delco, Eaton, Fisher-Price, G.E., General Motors, ITT, Kimball, Lamda, Nebco, R.R. Donnelly, Singer TRW, Westbend, Whirlpool and Zenith. Many of these companies have twin plant operations in the Valley.

The Lower Rio Grande Valley is also a tourist mecca. In the winter it is visited by thousands of winter visitors from northern states, who stay in the Valley for several months enjoying the

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[3] A *Survey* by Sales & Mktg. Mgmt. Mag. (November 13, 1990).

[4] The term "Maquiladora" derives from the Spanish verb *maquilar*, which means "to mill for a fee." It is said that Mexican farmers would take their grain to a mill to be ground into flour. They would continue to own the grain even after the grinding and paying for the value added, or paying for the labor and services of the grinding. In Mexico, a *maquila* is a production facility that processes or assembles components into a finished product at low wage rates. These products are then returned as exports to their country of origin or are exported to another country. A maquiladora is allowed to import materials and components into Mexico, and it pays duty only on the value added to the finished product as it enters the export market. The maquiladora program was created by Mexico in 1965 to deal with Mexico's high unemployment and to promote industrialization. From 1965-1970 the maquila program grew slowly, but a dynamic expansion began by the mid-1970s. By 1978, Packard Electric, a division of General Motors, established the first automotive maquila in Mexico. Ford and Chrysler soon followed. Today, automotive parts and components form a significant portion of the maquila program.

warmer temperatures and visits into Mexico. During the summer and on a year-around basis, the area is visited by those seeking hunting, fishing, water sports and beach combing on South Padre Island and Boca Chica Island adjacent to the mouth of the Rio Grande as it empties into the Gulf of Mexico.

The economy in the Lower Rio Grande, and, indeed, the whole southwestern border region will be impacted by the proposed free trade agreement with Mexico. It is believed that the long term impact will be broad-based stimulus to continued growth in the area as commerce between the U.S. and Mexico is increased and grows.[5]

The early growth of irrigation and agriculture beginning in the early 1900s and urbanization focused great attention on the Rio Grande since it represents the areas main source of water supply. It is said that in the first half of the 20th Century, the area's economy actually fluctuated depending upon the amount of water in the River. Continued growth and urbanization created the need for more certainty as to the rights to the water, which in turn created water wars and controversies in the Lower Rio Grande. The initial phase of the water wars entered the courthouse in the 1950s when the State and the Valley suffered one of their most severe droughts.

II. LOWER RIO GRANDE WATER RIGHTS

A. State of Texas, et al. v. Hidalgo County Water Control & Improvement District No. 18, et al., reported at 443 S.W.2d 728 (err. ref'd. n.r.e.) - The Valley Water Suit

1. Background - Dual System of Water Rights

The Valley Water Suit culminated almost 20 years of various attempts in the courts to determine the rights of irrigators and other users to the waters of the Lower Rio Grande. Texas water law at the time was a dual system consisting of a blend of English common law and Spanish law concepts. The dual legal system of water rights pitted the "appropriators" who applied and followed the early Texas Irrigation Acts of 1889 and 1895 and the later Irrigation Acts of 1913 and 1917 on the one hand, against other riparian users on the river bank who followed the common law riparian rights concepts.[6]

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[5] See, *The Likely Impact on the United States of a Free Trade Agreement with Mexico,* Report to the Committee On Ways and Means of the U.S. House of Representatives and the Committee on Finances of the U.S. Senate, U.S. Int'l Trade Comm'n Publication 2353, Ch. 5, pp. 5-1 to 5-7, February, 1991.

[6] For an interesting review of the background and discussion of the *Valley Water Suit*, see Smith, "The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future," 8 Texas Tech Law Review 577-636 (1977).

Early on, the Texas legislature attempted to provide a means to determine and adjudicate water rights. The Irrigation Act of 1917 gave a state water agency the power to adjudicate water rights on an administrative basis. However, the Texas Supreme Court, in *State Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301 (1921), held that portion of the law unconstitutional as a violation of the separation of powers doctrine, by granting judicial powers to an executive agency. This left the State in a state of chaos with respect to water rights for over 40 years. From the 1913, 1917 Acts to the first effort at a stream adjudication process in the *Valley Water Suit*, the dual system of water rights occupied the courts and was an uncertain basis for agricultural and urban development. It was these two systems of water rights to a flowing stream – the riparian and the prior appropriation systems, which collided in the *Valley Water Suit*.

The differences between the two systems are significant. Under the riparian doctrine, an owner of land bordering a stream is entitled to the use of the water flowing past his land. Without ownership of land contiguous to the stream, no riparian rights can exist in the landowner. *Watkins Land Co. v. Clements,* 98 Tex. 578, 86 S.W. 733 (1905). Riparians have correlative rights to the use of the water in that each landowner has the right to have the water flow past his land "undiminished in quantity and unimpaired in quality." *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926).

Under the prior appropriation system, on the other hand, water rights are not dependent upon the ownership of land abutting the stream. An appropriator makes a public filing, a dedication of record, or permit application and must divert the water from its natural course and apply it to beneficial use to fix his appropriation. An appropriator's right is fixed and definite and is based on beneficial use. The "first in time, first in right" rule applies to the appropriation system with the first appropriator enjoying a superior right against subsequent appropriators. The conflict between these two systems created the background for *Valley Water Suit*.

Hundreds of lawyers and the judiciary wrestled with myriad legal and procedural problems in the *Valley Water Suit*. It was a dispute involving thousands of parties. There were those who said that "the case could not be tried." Also unique to the Rio Grande was the existence of the U.S.-Mexico Treaty of 1945, which divided the waters from Ft. Quitman to the Gulf between the U.S. and Mexico.[7] The Treaty provided that each country could divide its share of the water. It contained language indicating that the IBWC could limit water for irrigation to those irrigating on the Treaty date. This and other water rights issues would be finally resolved in the *Valley Water Suit.*

[7] *Treaty on Water Utilization*, February 3, 1944, United States-Mexico, 59 Stat. 1219.

2. Judicial Control of the River

A severe drought in 1951 induced the first venture into the courthouse. A few downstream water districts in Cameron County (the County bordering the Gulf) sued selected riparian districts upstream in Hidalgo County to the west, seeking to enjoin the upstream riparian districts from taking water belonging to the downstream appropriator districts. In a landmark decision, the Texas Court in this case held that a state court could apportion the flow of a stream among irrigators, and pending final adjudication, could maintain the status quo by injunction. *Hidalgo County Water Improvement District No. 2 v. Cameron County W.C.& I.D. #5,* 253 S.W.2nd 294 (Tex. Civ. App. – San Antonio, 1952, writ ref'd n.r.e.). The Texas Supreme Court upheld a local District Court's injunction, which took charge of the River and actual custody and distribution of the water. The Court appointed a watermaster and set up machinery for equitable division of water. This case established a significant principle that stream adjudication could be accomplished in court and the Court could control water use while the adjudication took place.[8]

3. State Versus Federal Adjudication

The next chapter in the Valley water rights litigation was in federal court. There, appropriator districts sued riparian districts claiming that the 1945 Treaty protected them and allowed the IBWC to make the water rights determination. In *Hidalgo County Water Control & Improvement District No. 7 v. Hedrick*, 226 F.2d 1 (5th Cir. 1955), *cert. denied,* 350 U.S. 983 (1956), two water districts with appropriative rights filed suit in federal court against some of the riparians. The appropriators sought a declaratory judgment to the effect that their appropriative rights were protected by the U.S.-Mexican Treaty, and as such, the riparians should be enjoined from taking waters from the Rio Grande in derogation of their appropriative rights. The federal court, however, bowed out, holding that the Treaty did not supersede the water laws of the State pertaining to riparians and appropriators. This established that the battleground for Rio Grande water rights would be in the Texas state courts.

4. Voluntary Water Administration

The earlier Texas state court's holding that a district judge had jurisdiction to take control of the flow of a running stream, provided a basis for a temporary accommodation. Rio Grande Valley water interests entered into a voluntary water administrative program in what was referred to as the "Falcon Compact." In the Falcon Compact, Valley water interests agreed voluntarily to employ a watermaster, and voluntarily submitted to an equitable division of water among themselves covering municipal use in the area and over 450,000 acres of irrigation rights. This approach had some success and worked for a while. It provided confidence and laid the framework for the final chapter of the fight the *Valley Water Suit.*

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[8] This particular case was later abandoned due to disqualification of a trial judge because he owned land receiving irrigation water from the Rio Grande plus, it rained on the watershed filling Falcon Reservoir, which relieved the pressure for a time.

5. Valley Water Suit is Commenced

During the middle 1950s, the conflict in Texas water law between the prior appropriation and riparian systems caught the attention of lawyers over the state and in the law schools.[9] In the midst of which, in 1956, the stored waters in Falcon Reservoir again were reduced below requirements for domestic and municipal use and in spite of the voluntary efforts of the Falcon Compact, the uncontrolled users on the River were pumping without regard to the needs of others. Thus, the failure of the Falcon Compact coupled with low water levels in Falcon Reservoir to a minimum level threatening human needs for water, created an emergency which left no option but a return to the courthouse.

The State Board of Water Engineers requested the IBWC to act in the emergency. On June 27, 1956, the State of Texas, acting through its Attorney General, joined by the major cities of the Lower Rio Grande Valley, filed suit in district court in Hidalgo County naming 40 water districts and some 650 corporations and individuals.

The local District Court Judge entered an order taking custody of the U.S. share of water in Falcon Reservoir and appointed a watermaster. Pleadings were filed seeking an adjudication of all water rights to the U.S. share of waters stored in Falcon Reservoir and in the River below Falcon Dam. Riparian and prior appropriation forces lined up against each other. After much deliberation, some of the parties abandoned their riparian claims for the stronger legal claims and with the urging of the Texas Attorney General, the riparian water right issue was severed from the main suit. In this severed case the appropriators claimed that a riparian right of irrigation was not appurtenant to Spanish land grant lands and did not exist in the Lower Rio Grande. It should be noted that substantially all of the irrigated land in the Lower Rio Grande reach lies in original Spanish and Mexican land grants.

After several years of proceedings and thousands of pages of expert testimony on Spanish and Mexican water law, the Texas Court of Civil Appeals held that Spanish and Mexican grants along the Lower Rio Grande did not carry with them appurtenant riparian irrigation rights, and that statements made by way of *dicta* in *Motl v. Boyd* to the contrary, were not *stare decisis* of the question. Without a specific grant of a riparian irrigation right, none could exist. Since none were granted in the grants along the Rio Grande, a riparian irrigation right did not exist in the Lower Rio Grande. *State v. Valmont*, 346 S.W.2d 853 (Tex. Civ. App. – San Antonio 1961). Later, the Texas Supreme Court agreed and affirmed and adopted the opinion of the Court of Civil Appeals. *Valmont Plantations, Inc. v. State of Texas*, 163 Tex. 381, 355 S.W.2d 502 (1962).

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[9] For interesting discussions of water law as it existed in the state at that time prior to the *Valley Water Suit*, see "University of Texas Proceedings on Water Law" held in 1952, 1955, 1954. Also, White & Wilson, "The Flow and Underflow of *Motel v. Boyd*," 9 S.W.L.J. 1 (1955).

With the riparian issue settled, with the *Hedrick* case settling all hopes that the federal government would or could adjudicate the water rights, with the earlier court case holding that a local district judge could take judicial custody of the water and run the stream, and after six years from the original 1956 filing, the setting was now ripe for the resumption of the main *Valley Water Suit* case. Pleadings were refiled and steps taken to complete the litigation. To give a perspective of the dimension of the litigation: the pleadings of six parties who joined together and filed an original answer and cross-action against all parties in the *Valley Water Suit*, when completed ". . . contained 175 pages, and 3,000 copies were printed (amounting to a stack of papers . . . over 200 feet high)." This was only the pleadings of six parties in the suit. The lawyers among us can fathom the complexity of a case involving thousands of parties arising in the context of the available technology and capabilities of the court system in the 1960s.

The main trial in the *Valley Water Suit* began in February, 1963. A special judge held trials two weeks out of each month.[10] After 56 volumes of oral testimony and many thousand exhibits, the Trial Court entered a Judgment on August 1, 1966. The Trial Judge, however, in the Judgment, attempted to retain jurisdiction of the case so that features of the Judgment could later be modified based on changed circumstances. This raised the question whether the Judgment was final. This issue was tested by a mandamus proceeding in the Texas intermediate Court of Civil Appeals. The Court held that in spite of the Trial Judge's language, the Judgment was final. *State v. Starley*, 413 S.W.2d 451, 466 (Tex. Civ. App. – Corpus Christi 1967, no writ).

The Trial Judge recognized not only legal appropriation water rights, but also rights based on long use of water by the numerous parties. This adjudication was refined by the Court of Civil Appeals into two classes, a Class "A" water right based upon legal appropriation water right evidence and a Class "B" water right based upon equitable long use of water. The Class "B" right was, in essence, a resurrection of the old riparian claims in another form. *State v. Hidalgo County W.C.& I.D. #18*, 443 S.W.2d 728 (Tex. Civ. App. 1969, *writ ref'd n.r.e.*). Of course, the recognition of the Class "B" equitable claims was unprecedented and appeals were taken to the Texas Supreme Court. The Texas Supreme Court without a formal opinion, allowed the Court of Civil Appeals Judgment to become final in 1971, almost 20 years since the *Valley Water Suit* saga had begun. With this, the *Valley Water Suit* rested, with the water rights to the Lower Rio Grande determined. The Middle and Upper Rio Grande water rights were yet to be determined.

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[10] The Honorable J. H. Starley from Pecos, Texas, finally tried and entered final judgment in the case, after several years were lost in finding a judge not disqualified to serve in the case because of a conflict of interest of owning an interest in land in the water rights adjudication area. This is a typical problem in a stream adjudication case, and in addition to the cases reaching the Texas appellate proceedings discussed, several others involving the quest for a judge occupied the Texas courts before the *Valley Water Suit* was finally tried: *Hidalgo Co. Water Improvement Dist. No. 1 v. Baysen*, 354 S.W.2d 420 (Tex. Civ. App. 1962, *writ ref'd); Hidalgo & Cameron Cos. Water Control & Improvement Dist. No. Nine v. Starley, Special District Judge*, 373 S.W.2d 731 (Tex. Sup. 1964).

Worthy of note is that during this period, a group of water districts in the Lower Valley took the initial steps to determine whether upstream rights in the Middle and Upper Rio Grande could be similarly adjudicated. The main thrust of this litigation was to establish venue of such action in a local state court. The Lower Valley interests filed suit against a selected class of defendants above Falcon Dam and Reservoir and below Amistad Dam in an Hidalgo County district court, thought to be more favorable than an upstream court. The reaction upstream in the Middle Rio Grande, of course, was prompt. A District Judge in Webb County in Laredo granted an injunction against the litigation. This injunction was appealed to the Court of Civil Appeals. The appellate court dissolved the injunction and upheld venue in Hidalgo County. *Maverick Co. W.C.& I.D. #1 v. City of Laredo*, 346 S.W.2d 886 (Tex. Civ. App. – San Antonio 1961, *writ ref'd n.r.e.*). Later, in the initial suit, the appeals courts affirmed venue against the upstream interests in the downstream county of Hidalgo. *Hidalgo & Cameron Counties W.C.I.D. #9 v. Maverick Co. W.C. & I.D. #1*, 349 S.W.2d 768 (Tex. Civ. App. – San Antonio 1961, *writ dism'd).* Thus, this Court's holding placed the Lower Rio Grande interests in a position to adjudicate water rights of upstream users in the Middle Rio Grande in a Lower Valley Hidalgo County (downstream) Court. This Court's holding placed the Rio Grande downstream interests in a favorable venue position with respect to the adjudication of the water rights of their neighbors upstream. The realities of the situation indicated that in spite of this apparent advantage of place of adjudication, an administration agency adjudication, as opposed to court adjudication, could be more beneficial to all concerned.

B. Texas Water Rights Adjudication Act of 1967

The experience in the *Valley Water Suit* upon serious evaluation, indicated that it was more favorable to have an administrative agency determination of water rights as opposed to a court adjudication. A group of attorneys involved in the *Valley Water Suit*, working through the Texas State Bar Water Committee, initiated drafting of a proposed Water Rights Adjudication Act. At the time, the possibility for the creation of a statewide water court for the adjudication of water rights was also discussed.[11] However, administrative adjudication of water rights was finally adopted by the Texas legislature in the *Water Rights Adjudication Act of 1967. See,* V.T.C.A. Water Code § 11.301, *et seq.*

This Act provides for the marshalling and formulation of evidence by an administrative agency (now, the Texas Water Commission). Careful drafting avoided the constitutional issue raised in the *McKnight* case discussed above in relation to the wording of the 1917 Irrigation Act water rights adjudication provisions.

[11] Smith, *A Water Court as an Alternative to Administrative Adjudication,* University of Texas Proceedings on Water Law 43-65 (1966).

The first adjudication case sought by the Texas Water Rights Commission (TWRC) under the Adjudication Act was the adjudication of the water rights in the Middle Rio Grande (between Falcon and Amistad Dams). This adjudication was not completed until 1984. During the course of that adjudication, the Upper Rio Grande rights were also adjudicated and completed.

Where the Lower Valley Water Suit involved thousands of parties, the Middle Rio Grande involved several hundred parties. However, several interesting water right issues were raised in this case in an aftermath of the Valley Water Suit.

1. Adjudication of Middle Rio Grande Rights

The adjudication of the water rights in the Middle Rio Grande was the first adjudication case undertaken under the 1967 Adjudication Act. The hearings in this adjudication case began in the early 1970s and ended in a Final Determination by the TWRC of irrigation rights to more than 200,000 acres and municipal rights for the cities of Laredo, Eagle Pass and Del Rio and several smaller towns and unincorporated communities in the middle Rio Grande reach.

The TWRC's Final Determination patterned irrigation water rights similar in concept to those in the Lower Rio Grande under the *Valley Water Suit*. It found equitable rights as well as riparian rights. An association of Lower Valley water districts contested the extent of the upstream rights in the Adjudication case. One issue highly litigated before the TWRC and District Court was the existence of a riparian irrigation right in non-Spanish/Mexican land grants (Texas Patent lands). The Lower Valley Districts contended basically that the prior Texas Court decisions in riparian right cases did not lie on sound legal ground as reflected by the *Valmont* decision, and that early Texas land law was patterned after the Spanish and Mexican legal system, which required a similar result with respect to the existence of riparian rights in Texas Patent lands as in the *Valmont* case. The riparian rights individual cases were not large in number and were not appealed and this issue was left unresolved. Also, during the course of court appeal, many of the cases were resolved by agreement and not appealed, except for contentions of the cities of Laredo and Eagle Pass, which reached the Texas appellate courts.

a. Pueblo Water Rights

The *City of Laredo* case raised the interesting question as to whether the law of Texas recognized the Pueblo Water Rights Doctrine. The Texas appellate court, consistent with the earlier *Valmont Plantations* riparian water right case, held that the controlling law was the law of the granting sovereign. *In re: The Contests of the City of Laredo, et al., to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries*, 675 S.W.2d 257 (Tex.App. – Austin [3rd Dist.] 1984, ref'd n.r.e.). When Laredo was established in the middle of the 18th century, what is now Webb County, in which it is located, was a part of the Spanish Empire subject to the laws of Spain and New Spain.

It is recalled that the Texas Court in *State v. Valmont Plantations*, held that there was no implied irrigation rights in Spanish and Mexican law. A specific Spanish or Mexican grant of waters was necessary for the recognition of a riparian irrigation right, and in so holding, the Court found that

there was no implied irrigation rights in Spanish and Mexican grants in the *Valmont* case. After *Valmont*, the Texas Supreme Court held in another case that a Mexican land grant in Bexar County carried no implied right to the waters of a non perennial stream crossing the lands of the grant.[12] Consistent with those cases and refusing to follow the position of the California and New Mexico courts, the Texas Court held that the law of New Spain did not expressly create a municipal water right in the nature of a Pueblo Water Right and because a municipal water right was not expressly granted to Laredo at its founding, the City had no such rights.

In arriving at its conclusion, the Court discussed at length the law of Spain and New Spain and the nature of the Pueblo Water Right under California and New Mexico court rulings. The Pueblo Water Right in California has been construed to grow with the needs of an expanding town or city and thus, has no limit in the future. Under the California Doctrine, a Pueblo Water Right extends to all surface and groundwaters from the stream that flowed through the original pueblo, including its tributaries, from its source to its mouth and is a superior right to all other appropriators.[13] The Texas Court noted that a New Mexico court held that the Doctrine of Pueblo Water Rights applied to the New Mexico City of Las Vegas reasoning that the same reasons which brought the Supreme Court of California to uphold and enforce the Pueblo Water Rights Doctrine, would apply as well to the State of New Mexico. *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 24, 343 P.2d 654 (1958). The Texas Court held, however that judicial interpretation of Spanish law by the highest court of another state does not have to be accepted by Texas courts as the correct interpretation. The Texas Court declined to follow the opinions of the California and New Mexico courts and the Texas Supreme Court refused to overturn the lower Court's holding. Thus, the Court settled the Pueblo Water Right question for the State of Texas in finding that none exists unless it was specifically granted in the original grant.

b. Water Duty

The other case finding its way into the appellate courts arising out of the Middle Rio Grande adjudication, involved the City of Eagle Pass. *In re the Contests of the City of Eagle Pass, et al. to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries*, 680 S.W.2d 853 (Tex. App. – Austin [3 Dist.] 1984, ref'd n.r.e.). This was a contest concerning the interpretation to be given certified filings of the city. An important issue resolved by the Court in the case was the affirmance of the ability of the TWC to establish a "duty of water" standard to evaluate and adjudicate water rights. This case cited with approval the definition of "duty of water" as contained in *Farmers' High Line & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629, 634 (1954). Although the Court held that the judgment and TWC Determination could be affirmed on other basis, it did confirm that the law in Texas

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[12] *In Re: The Adjudication of Water Rights in the Medina River Water Shed of the San Antonio River Basin*, 670 S.W.2d 250 (Tex. Sup. Ct. 1984).

[13] *See, e.g., Los Angeles v. Pomeroy*, 124 Cal. 597, 649-650, 57 P.585 (1899).

could consider not only the amount of water actually used in adjudicating the water right, but also whether such quantity was economically necessary when used reasonably and diligently, a concept implicit in the water duty context.

2. Adjudication of Upper Rio Grande Rights

The adjudication of the rights in the Upper Rio Grande above Amistad Reservoir was mainly to the tributaries to the Rio Grande. These rights do not involve water in storage as the rights in the Middle and Lower Rio Grande. They are "run-of-the-river" rights. The TWC likewise adjudicated these rights; however, its Determination was affirmed without controversy by a District Court and did not reach the appellate courts.

C. Water Rights Administration

The Lower Rio Grande Reach became accustomed to water rights administration under the voluntary Falcon Compact discussed above.[14] Later, during the pendency of the *Valley Water Suit*, water users in the Valley were regulated by a court-appointed watermaster. All parties in the suit were required to file pleadings stating their claim of right and the amount of water that they had used prior to the filing of the suit. These applications became the basis of the Court's temporary order in which the Court allocated water pro rata among all claimants based upon their claims. The water of each claimant was allotted to him monthly based on inflows into the reservoir. The water allocation system is operated much like a bank accounting system.

The Court appointed watermaster regulated the diversion and taking of water from the stream by issuance of permits for pumping after the water user placed orders for the water.[15] Travel time from the reservoir down the stream to the point of diversion is taken into account. The watermaster enforced rules and regulations through contempt proceedings before the district court.

The Water Rights Adjudication Act of 1967 implemented a watermaster operational system similar to that along the Rio Grande. When the Judgment in the *Valley Water Suit* became final, the TWC, under the terms of the Judgment and the Adjudication Act, took over administration of the Court's watermaster office and has administered the Lower Valley's water rights since that time.

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[14] *Supra*, pages 12.

[15] All water is diverted by pumping in the Lower Rio Grande reach. There is no substantial gravity diversion on the Lower Rio Grande except for Maverick Co. Water Control & Improvement Dist. No. 1 in the Middle Rio Grande reach, which holds gravity diversion water rights.

Likewise, under the terms of the Final Judgment in the Middle Rio Grande Adjudication, the Lower Rio Grande Middle reach is also under the administration of the Rio Grande Watermaster, who now administers all rights downstream from Amistad Dam. Both Reservoirs are considered as a single unit in the overall administration.

As noted above, the manner of ownership of the U.S. share of water in the Lower Rio Grande is determined by the 1945 Treaty and is administered by the U. S. Section of the IBWC in conjunction with the Mexican Section of the IBWC. However, Texas State law controls the rights to the U.S. share and use of the conserved water in the reservoirs.[16] Thus, the rights to releases of the U. S. share of water are determined by rights recognized in the *Valley Water Suit* Judgment with respect to the Lower Rio Grande and the Final Judgment in the Middle Rio Grande Adjudication with respect to the Middle Rio Grande.

Water rights administration on the Rio Grande is unique to the Rio Grande in the State. Until a few years ago, no other stream in the State was covered by a watermaster operation. The San Antonio-Nueces River Basin is now administered by watermaster operations under the authority of the 1967 Adjudication Act. Recently, the TWC has incurred obstacles in its efforts to implement watermaster operations in other streams in the State. Those on the Lower Rio Grande feel as though the watermaster operation is necessary to protect and enforce their water rights.

III. CHANGING WATER NEEDS

The *Valley Water Suit* Judgment found irrigation rights to about 740,000 acres, amounting to a right to divert when available, of approximately 1,900,000 acre feet per year. Over 80 percent of the irrigation water rights are held by Valley water districts. The Judgment also provided for 135,980 acre feet of water per year for municipal, industrial and other uses. These municipal water rights have priority rights to any inflows and are assured of a full allocation each year. The *Valley Water Suit* Judgment provided for additional municipal reserves of 60,000 acre feet in the reservoirs for municipal use, which was later increased to 225,000 acre feet when the Middle Rio Grande rights came under administration. These reserves are maintained on a monthly basis for both the Lower and Middle reaches under TWC Administrative Rules.

Irrigation water right holders do not have the assurance of receiving all the water to which they are entitled on a year-to-year basis. Although 2.5 acre feet is allowed for irrigation use per acre each year under an irrigation water right, during the period 1978-1989 the amount actually allocated to irrigation varied from a low of .4 acre foot per acre in 1979, to a high of 2.15 acre

[16] *See, Hedrick* case above, pages 11, 14.

feet per acre in 1986, for an average of 1.03 acre feet per acre per annum of available irrigation water supply during the period. During this period, for example, if there had not been water in storage in the Reservoirs at the beginning of 1978, there would have been no useable water in storage for irrigation at the beginning of 1990.

The Lower Rio Grande is an overappropriated River. The TWC and its predecessors have entered orders on the Lower Rio Grande to the effect that no additional rights should be granted.

Due to urbanization and growth in the Lower Rio Grande discussed earlier, stress is again building regarding water rights and needs. Some cities in the Lower Rio Grande are seeking additional municipal use water rights. By 1989, municipal water rights in the Lower reach increased from the 135,980 acre feet per annum originally adjudicated in the *Valley Water Suit* Judgment in 1971, to 185,449 acre feet per annum. This increase in authorized use was due to irrigation water rights being acquired by municipal suppliers and conversion of the irrigation rights to municipal use rights under TWC Rules. This conversion from irrigation to municipal use rights arose from water right transfer transactions beginning in the early 1970s.

Soon after the *Valley Water Suit* Judgment became final, the TWC, following the principles of an early court case,[17] determined that it could treat an adjudicated water right on the same basis as an appropriation or permit and could recognize a water right transfer and amend the water right by changing its point of diversion, place and purpose of use. This determination by TWC has allowed water right transfer transactions to occur where a municipal supplier, for example, purchases or otherwise acquires a water right from an irrigation user. Then, by application to the TWC seeks to amend the water right so as to change its point of diversion, place of use and purpose of use from irrigation to municipal. This is accomplished by Order of the TWC amending the original right. As noted, close to 50,000 acre feet of water per annum of rights have been so converted in the last 20 years.[18]

The TWC Administrative Rules also allow for the temporary sale of water from one water right holder to another for the same purpose of use in order to take care of emergency situations.[19] These are one time sales of quantities of water (*i.e.*, water allocations) as opposed to the transfer of the water right itself, as in the water rights situation.

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[17] *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674 (Tex. Civ. App. –1947).

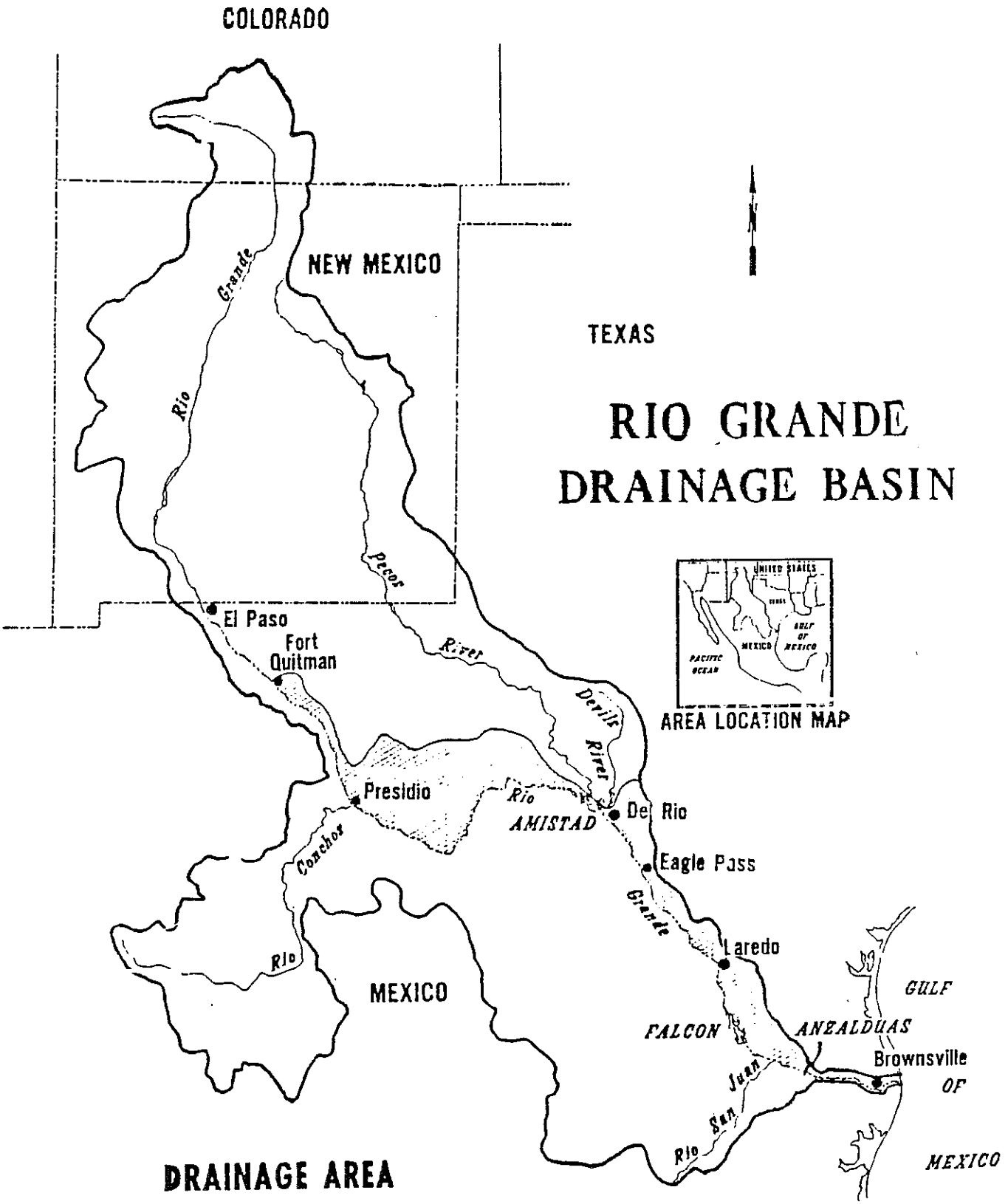
[18] Under Texas Water Commission Administrative Rules, a conversion factor is applied to water allocations when rights are converted from irrigation use to municipal use priority water rights. An acre of irrigation rights is converted to a municipal priority right to divert from 1.0 acre feet to 1.25 acre feet per annum of municipal use rights. *See*, 31 TAC, § 303.43.

[19] *See*, Contract Sales Rules, 31 TAC §§ 303.51-303.55.

There have also been occasional transfers of irrigation rights to other irrigators, but the greatest majority of water rights transfers in the Lower Rio Grande Valley have been from irrigation to municipal use.

There have likewise been water right transfers from irrigation to municipal use in the Middle reach of the Lower Rio Grande. There have also been water rights transfers from the Lower Rio Grande reach to the Middle Rio Grande reach.

Since the Lower Rio Grande is an overappropriated stream, there is an identified and limited amount of existing water rights. No other additional water rights will be recognized unless conditions and circumstances change. Water rights are valuable real property rights and are deserving of legal protection and treatment. The water right transfer mechanisms originally developed in the Lower Rio Grande appear to accommodate the changing water needs in the Lower Rio Grande. Although there are from time to time, legislative battles and potential water wars in the Lower Rio Grande over the use of its waters, there appears to be stability in the water rights system and proper tools for meeting the challenges of the changing needs of the users in the area.



RIO GRANDE DRAINAGE BASIN

DRAINAGE AREA WATERMASTER OPERATION

Appendix "A"