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Interbasin Transfer Information

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Introduction

This notebook represents a compilation of materials that have been presented to members of the Texas Legislature in subsequent sessions since the passage of SB 1 in 1997.

The compilers of this notebook were involved with this issue before the introduction of SB 1 and have fought hard to keep the existing language as it is written. However, a compromise was accepted in 2013 that is known as the junior priority language. This latter section is one of the least understood provisions of SB 1.

We hope this notebook contributes to the understanding of this issue going forward. If there are any questions or comments please let me know at mjb@baw.com.

Michael Booth

May 10, 2016

Texas Water Code §11.085

This is the original statutory provision on interbasin transfers that was codified in §11.085:

"Interwatershed Transfers. (a) No person may take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, watercourse, or watershed in this state into any other natural stream, watercourse, or watershed to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted. (b) No person may transfer water from one watershed to another without fist applying for and receiving a permit form the commission to do so. Before issuing such a permit, the commission shall hold a hearing to determine the rights that might be affected by the transfer. The commission shall give notice and hold the hearing in the manner prescribed by its procedural rules. (c) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $100 nor more than $500 or by confinement in the county jail for not more than six months. (d) A person commits a separate offense each day he continues to take or divert water in violation of this section."

Below is the current version of §11.085. Since the SB1 changes in 1997, §11.085 has been amended three other times.
These amendments are shown in the text as follows:

- 2001 Amendments in **ORANGE**
- 2009 Amendments in **PURPLE**
- 2013 Amendments in RED

Explanations of the amendments are given in the footnotes.

Sec. 11.085. INTERBASIN TRANSFERS.

(a) No person may take or divert any state water from a river basin in this state and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a permit, certified filing, or certificate of adjudication from the commission authorizing the transfer.

(b) The application must include:

(1) the contract price of the water to be transferred;

(2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category; and

(3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users.

(c) The applicant shall provide the information described by Subsection (b) of this section to any person on request and without cost.

(d) Prior to taking action on an application for an interbasin transfer, the commission shall conduct at least one public meeting to receive comments in both the basin of origin of the water proposed for transfer and the basin receiving water from the proposed transfer. Notice shall be provided pursuant to Subsection (g) of this section. Any person may present relevant information and data at the meeting on the criteria which the commission is to consider related to the interbasin transfer.

(e) In addition to the public meetings required by Subsection (d), if the application is contested[1] in a manner requiring an evidentiary hearing under the rules of the commission, the commission shall give notice and hold an evidentiary hearing, in accordance with commission rules and applicable state law. An evidentiary hearing on an application to transfer water authorized under an existing water right is limited to considering issues related to the requirements of this section.

(f) Notice of an application for an interbasin transfer shall be mailed to the following:

(1) all holders of permits, certified filings, or certificates of adjudication located in whole or in part in the basin of origin;

(2) each county judge of a county located in whole or in part in the basin of origin;

(3) each mayor of a city with a population of 1,000 or more located in whole or in part in the basin of origin; and

(4) all groundwater conservation districts located in whole or in part in the basin of origin; and

(5) each state legislator in both basins.

(g) The applicant shall cause the notice of application for an interbasin transfer to be published in two different weeks within a 30-day period[2] in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin or the receiving basin. The published notice may not be smaller

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[1] The 2013 amendments deleted "of this section," which directly preceded "if the application is contested," and added the second sentence, "An evidentiary hearing on an application to transfer water authorized under an existing water right is limited to considering issues related to the requirements of this section." Acts 2013, 83rd Leg., ch. 1065 (HB 3233). This amendment also deleted subsec (b) subd. (4).

[2] The 2013 amendment substituted "in two different weeks within a 30-day period" for what was previously "once a week for two consecutive weeks." Acts 2013, 83rd Leg., ch. 1065 (HB 3233).

than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices.

(h) The notice of application must state how a person may obtain the information described by Subsection (b) of this section.

(i) The applicant shall pay the cost of notice required to be provided under this section. The commission by rule may establish procedures for payment of those costs.

(j) In addition to other requirements of this code relating to the review of and action on an application for a new water right or amended permit, certified filing, or certificate of adjudication, the commission shall:

(1) request review and comment on an application for an interbasin transfer from each county judge of a county located in whole or in part in the basin of origin. A county judge should make comment only after seeking advice from the county commissioners court; and

(2) give consideration to the comments of each county judge of a county located in whole or in part in the basin of origin prior to taking action on an application for an interbasin transfer.

(k) In addition to other requirements of this code relating to the review of and action on an application for a new water right or amended permit, certified filing, or certificate of adjudication, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed 50 years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries that must be assessed under Sections 11.147, 11.150, and 11.152 of this code in each basin. If the water sought to be transferred is currently authorized to be used under an existing permit, certified filing, or certificate of adjudication, such impacts shall only be considered in relation to that portion of the permit, certified filing, or certificate of adjudication proposed for

transfer and shall be based on historical uses of the permit, certified filing, or certificate of adjudication for which amendment is sought;

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing permit, certified filing, or certificate of adjudication, if an amendment to an existing water right is sought; and

(5) the information required to be submitted by the applicant.

(l) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:

(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period, **as** determined by the commission based on consideration of the factors described by Subsection (k)[3]; and

(2) the applicant for the interbasin transfer has prepared a drought contingency plan and has developed and implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

(m) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

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[3] Acts 2013, 83rd Leg., ch. 1065 (HB 3233) inserted "as determined by the commission based on consideration of the factors described by Subsection (k)."

(n) If the transfer of water is based on a contractual sale of water, the new water right or amended permit, certified filing, or certificate of adjudication authorizing the transfer shall contain a condition for a term or period not greater than the term of the contract, including any extension or renewal of the contract.[4]

(o) The parties to a contract for an interbasin transfer may include provisions for compensation and mitigation. If the party from the basin of origin is a government entity, each county judge of a county located in whole or in part in the basin of origin may provide input on the appropriate compensation and mitigation for the interbasin transfer.

(p) **A river basin**[5] may not be redesignated in order to allow a transfer or diversion of water otherwise in violation of this section.

(q) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000 or by confinement in the county jail for not more than six months.

(r) A person commits a separate offense each day he continues to take or divert water in violation of this section.

(s) Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing.

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[4] The 2013 amendments inserted "term of the" and substituted "including any extension or renewal of the contract" for what was previously "term." Acts 2013, 83rd Leg., ch. 1065 (HB 3233).

[5] The 2001 amendment substituted "a river basin" for what was previously "For the purposes of this section, a basin is designated as provided in accordance with Section 16.051 of this code. A basin." Acts 2001, 77th Leg., ch 966.

(t) Any proposed transfer of all or a portion of a water right under this section from a river basin in which two or more river authorities or water districts created under Section 59, Article XVI, Texas Constitution, have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water services areas shall be junior in priority to water rights granted before the time application for transfer is accepted for filing.

(u) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section.

(v) The provisions of this section, except Subsection (a), do not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same permit, certified filing, or certificate of adjudication;

(2) a request for an emergency transfer of water;

(3) a proposed transfer from a basin to its adjoining coastal basin;

(4) a proposed transfer from the part of the geographic area of a county or municipality, or the part of the retail service area of a retail public utility as defined by Section 13.002, that is within the basin of origin for use in that part of the geographic area of the county or municipality, or that contiguous part of the retail service area of the utility, not within the basin of origin; or[6]

(5) a proposed transfer of water that is:

[6] The amendments in 2013 rewrote subsec. (v) subd. (4). Prior to the changes, subsec. (v) subd. (4) read "a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in the part of the county or municipality and the municipality's retail service area not within the basin; or"

(A) imported from a source located wholly outside the boundaries of this state, except water that is imported from a source located in the United Mexican States;

(B) for use in this state; and

(C) transported by using the bed and banks of any flowing natural stream located in this state.[7]

[7] Subsection (v)(5) was added by the 2009 amendment. Acts 2009, 81st Leg., ch. 1016.

Last Legislative Session

Interbasin Transfers: Junior Water Rights Protections

This legislative session an important water right protection is at risk. This protection has been commonly referred to as the "junior rights provision" or "junior" that is found in the water code as section 11.085(s) and (t) and other parts of Tex. Water Code Ann.§ 11.085. Many people mistakenly point to Senate Bill l (Act of June 1, 1997 75th Leg,. R.S., Ch. 1010, 1997 Tex. Gen. Laws 3610) as the origin for the protection of basin-of-origin water rights against amendments that add the authorization for interbasin transfer. Senate Bill 1 only clarified the protection for basin-of-origin water right that has been part of Texas Water Law since 1913. The reality is that if House Bill 1153 by Representative Turner were to pass in its current form, for the first time in history, basin-of-origin water rights would have no protection from water right transfers.

The reality is that the junior rights provision only hinders interbasin transfers that would impair existing basin-of-origin water rights. **It** only comes into play in situations in which there is insufficient water for both the existing, basin-of-origin uses and the new out-of-basin use. When there is sufficient water for the new out-of-basin use, the junior rights provision has no effect.

Historically, proponents of eliminating the junior rights provision have suggested that unless the State can authorize transfers to solve out-of-basin shortages by creating in-basin shortages, it will not be able to address its water needs. For example, the last time a repeal of the Junior Rights Provision was proposed, proponents suggested that the 216 interbasin transfer

projects included in the 2002 Texas Water Plan will be blocked if the junior water rights provision is not repealed. What they omit is that 216 interbasin transfer projects were evaluated and determined feasible under existing Law. In other words, these interbasin transfer based projects are feasible with the junior priority protection for basin-of-origin water rights. These projects can be completed without repealing the junior water right provision. Finally, the fact that there have been no interbasin transfers authorized that impair water rights needed to meet basin-of-origin demands does not mean that the junior water rights provision has had a bad effect on Texas water resources development. The transfers it inhibits, are transfers that should be inhibited. The only water projects that are stymied by the junior water rights provision are projects that are bad for the basin-of-origin and, therefore, bad for the State of Texas. The State will not solve its water resource issues until it focuses on solutions that are not, in reality, a step forward in one basin, cancelled out by a step backwards in another basin.

Thus far, there have been five bills filed that make changes to Tex. Water Code Ann.§ 11.085: HB 1153 by Scott Turner, HB 2805 by James Frank, HB 3324 by Lyle Larson, and SB 1411 and SB 1588 by Craig Estes. HB 2805 exempts transfers between the Red River Basin and the Trinity River Basin. SB 1411 exempts transfers from one basin to an adjoining basin. SB 1588 removes the protection against interbasin transfers in the case of an interbasin transfer that is identified as a water management strategy or alternate water management strategy in the state water plan. HB 1153 repeals the statewide protection from interbasin transfers (11.085(s)) as well. As the interbasin transfer protection applicable protecting water rights in the Colorado River basin (11.085 (t)). HB 3324 has been set for hearing on April 8 at 2 p.m. or adjournment. This bill makes several changes to the IBT protections. It removes the possibility of mitigation

or compensation to the basin-of-origin. It proposes that an IBT be evaluated as to "the effect of the proposed transfer of water on promoting the highest efficiency and productivity of water use in this state". It also proposes to remove the requirement that the benefits to the recipient basin be greater than a detriment to the basin-of-origin. It also proposes to add two more classes of exemptions to Section (v) of Tex. Water Code Ann. § 11.0854. These are "(6) a proposed transfer of water resulting from recycled or desalinated water produced in the basin-of-origin; or (7) a proposed transfer of treated wastewater derived from water that was transferred to the basin-of-origin of the proposed transfer from the basin to which the effluent is returned."

GLOSSARY OF TERMS RELATED TO INTERBASIN TRANSFERS

1. **State Water:** Among other things, water flowing in a river, stream or lake.

2. **Water Right or Appropriation:** A right acquired under the laws of the State to use state water. A water right or appropriation is evidenced by a permit or certificate of adjudication. The terms of a water right include authority to use a certain quantity of water at a certain place for a particular purpose with a specific priority date.

3. **Run-of-the-River Right vs. Storage Right:** A storage right allows the impoundment of water in excess of current need for use later in times of low or no river flow. Storage may be "on-channel" of the river in which the right to use water is granted, or it may be "off- channel," at a point remote from the point that water is diverted from the river. By contrast, the dependability of a run-of-the-river water right is not based on the ability to store water for later use. Such rights are limited by the availability of flow at any given time.

4. **River Basin**: The drainage area that contributes stormwater runoff to a specific river, including any closed watersheds internal to the basin. The State has designated 15 major river basins and eight coastal basins for the purposes of determining when a proposed transfer is from one basin to another.

5. **Interbasin Transfer**: Sometimes called an interwatershed an interwatershed transfer or a transbasin diversion, an interbasin transfer consists of diverting or storing water from one river basin for use or discharge in a different river basin. The transfer can include a new appropriation or an amendment to an existing appropriation that changes the place of authorized use. In the debate on SB 143, it is important to remember that junior priority only concerns amendments to water rights, not new appropriations.

6. **Basin-of-Origin and Receiving Basin**: The basin-of-origin is the basin that loses water in a transfer. The receiving basin is the basin to which the water is transferred.

7. **Time Priority of a Water Right**: In Texas, water rights are given a priority to signify in what order the holder can take his turn to divert water in times of shortage. The first in time is the first in right, meaning that in time of water shortage, the oldest right will be satisfied first (up to the amount of its actual need for the purpose and place of use specified) before the next oldest right can divert. When the older right is downstream, the younger or junior right must let water pass by in order to satisfy the senior.

8. **Senior Right and Junior Right**: Senior and junior are relative terms. Every water right, except the one very oldest right on the stream, is junior to some other right. Also, a water right that is senior as to some rights may be junior as to others. In this sense, a "junior right" may have been in use for many decades. Another way of saying junior water right is to say "less senior" water right.

9. **Vested Property Right**: Water rights become "vested" through actual beneficial use of water for an authorized purpose. A water right that has vested is protected by the state and federal constitutions and cannot be taken away by the State without compensation. Both junior and senior water rights can be vested property rights. Even a vested water right can be modified by the State under certain conditions, including when a change in the place of use is requested by the water right holder; for example, a request for an interbasin transfer.

10. **Section 11.085**: Section 11.085 is the statute in the Water Code that provides additional restrictions on water rights seeking to transfer from one river basin to another. Since 1912, the interbasin transfer statute remained essentially unchanged up until last legislative session where more procedural requirements were added in order to receive permission to take water from one river basin to another.

11. **Junior Priority Provision**: The general junior priority provision is found in Subsection (s) of Water Code § 11.085, as amended by Senate Bill 1. It provides that "any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing." Section 11.085(t) provides similar protection in the Colorado River Basin because of particular reservoir operation agreements.

12. **House Bill 1153**: This bill seeks to remove the junior priority provision by repealing Subsections (s) and (t) of Water Code § 11.085. The junior priority provision is the only absolute protection in the Water Code for existing water rights against injury from interbasin transfers.

13. **House Bill 2805**: This bill would exempt the Red River Basin and Trinity River Basin from Subsections (s) and (t) of Water Code § 11.085 and thereby remove the junior priority provision on transfers between these two areas.

14. **House Bill 3324**: This bill makes several changes to interbasin transfer protections, including: removes mitigation or compensation to the basin-of-origin; replaces benefit to recipient basin vs. detriment to basin-of-origin test with an evaluation of 'highest efficiency and productivity'; and adds exemptions for transfers of water derived from recycled, desalinated, or treated wastewater sources.

15. **Senate Bill 1411**: This bill would add interbasin transfers between adjoining basins to the list of exemptions in Water Code § 11.085 (v).

16. **Senate Bill 1588**: This bill removes the protection against interbasin transfers that are identified as a water management strategy or alternative water management strategy in the state water plan.

BACKGROUND AND TALKING POINTS
REGARDING THE JUNIOR PRIORITY PROTECTION
IN INTERBASIN TRANSFERS

BACKGROUND

What Priority Means

Texas surface water rights are based on a first-in-time, first-in-right system of time priorities. Time priority is based on when an application for a water right is accepted for filing by the state. Every new water right is junior to water rights in existence at that time. Time priority is, in this sense, relative. A water right may be junior to some rights and senior to others.

In a drought, the senior most surface-water right is satisfied first, then the next most senior, then the next, until the end of the time line – the least senior, or, to put it another way, the most junior. If a river system is overappropriated, it runs out of water before the most junior rights are satisfied.

If water rights were physically lined up on a river by time priority, it would be easier. Of course, they are not. When the senior is upstream, there is no problem – he can simply divert what he needs and the junior gets what is left. When a senior is downstream of a junior, the junior may be required to let flow pass him by to satisfy the senior, even though the junior needs to store or divert water himself. Where there is a watermaster, the system is actively administered in a drought. Where there is no watermaster, the senior may have to seek TCEQ or court intervention in order to enjoy his priority.

History of the Junior Priority Protection in Interbasin Transfers

Texas surface water statutes since 1913 have included special protections when an appropriator proposed to move water from one river basin to another. Prior to Senate Bill 1, enacted in 1997, the Water Code said that water could not be moved to a different river basin if it would prejudice persons or property in the basin of origin. The Texas Supreme Court interpreted that statute in 1966[1] and it found that the statute required a two-part test:

- First, you protect all existing water rights from impairment.
- Then, *with the water that is left over,* you balance the needs of the basins.

The TCEQ applied the statute over time in permitting decisions. The TCEQ may permit new water rights for new interbasin use and it also may permit amendments of existing rights to accommodate new interbasin use. It appears from research of the TCEQ records that more often than not, when amending an existing right for new interbasin transfer, the water agency protected other existing water rights by giving the new out-of-basin use a new, junior time priority – moving it back to the end of the line because of the change in use.

Senate Bill 1, *as filed* in 1997, did two things that lessened the protection of existing rights that, in concert, were especially troublesome.

- First, Senate Bill 1 omitted the existing "no prejudice" language that required the two-part test (protection of existing rights *and* balancing) and replaced that no-prejudice language with *only* a balancing process.
- Secondly, Senate Bill 1 enacted a new no-injury test for amendments generally that would allow sales of historically unused and unperfected water rights at existing time priority.[2] This compounded the new danger to existing water rights from removing the no-prejudice language.

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[1] This case is *City of San Antonio v. Texas Water Commin,* 407 S.W.2d *752, 758* (Tex. 1966).

[2] We know of no other western prior-appropriation states that allow this result. Also, it is not enough to just put the old no-prejudice language back in now – the no-injury rule should also be rolled back if the junior priority protection is repealed or modified.

The House put protection of existing water rights back into Senate Bill 1 for interbasin transfers. It did so with the express junior-priority protection.

Under Senate Bill 1 as passed, an application to amend an existing water right for out-of-basin use automatically triggers a time-priority change that makes the new use junior to other rights to use water from the basin of origin that are in existence at the time the application for amendment is accepted for filing. That means that in a drought, when there is not enough water for everybody in the basin of origin, existing in-basin water rights are satisfied first, in order of *their* relative time priorities before the new out-of-basin use is satisfied; then the out-of-basin use gets water; and finally come other water rights that are approved later in time than the amendment for out-of-basin use. The out-of-basin use, in this sense, isn't always last, it stands in line as of the time of the amendment application.

TALKING POINTS REGARDING THE JUNIOR PRIORITY PROTECTION

There are arguments on both sides of the interbasin transfer issue and regarding whether Texas should continue to protect existing rights in the basin-of-origin in the manner most traditionally done – junior priority for the new out-of-basin use. On balance, we feel that the arguments for keeping the junior-priority protection, by far, are the most compelling at this time. We feel that rural Texas and agricultural interests are particularly put at risk by a repeal of the junior-priority protection.

It is argued in favor of repealing the junior-priority protection that water supply planners need a full range of supply tools in meeting water demands.

Although this statement is easy to agree with, water supply planners still *have* interbasin transfers as a planning tool even *with* the junior priority protection.

The junior-priority provision will not stop interbasin transfers of water. There are major new water supplies proposed in the Senate Bill 1 regional plans that involve interbasin transfers. Take the recommended Marvin Nichols Reservoir, for example. That reservoir is recommended for construction in the Sulphur River Basin to, in part, meet needs in the Trinity River Basin. The water right for Marvin Nichols would be junior in time priority to existing water rights in the Sulphur River Basin – not because it is interbasin or because of Senate Bill 1, but because it is a new water right – simply that, a new water right, junior in time priority.[3]

We also are beginning to hear a lot about innovative solutions for making interbasin transfers work under existing interbasin transfer laws, like the agreement between LCRA and San Antonio that also develops new water.

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[3] As an aside, it appears that the Marvin Nichols Reservoir is reflected in the TWDB's regional planning summary pie charts as a new interbasin transfer rather than new water, but it is both Such statistics in the TWDB summary should not be used to imply that we need to change lots of existing rights to interbasin use, because the numbers won't match the argument.

- *Sometimes it is argued that there were 80 interbasin transfers prior to Senate Bill 1 and none after Senate Bill 1; therefore, junior priority must be preventing transfers.*

The "80-interbasin-transfers" argument is not supported in agency records. The argument appears to have sprung from a 1997 TCEQ informational memo that identified 80 pre-Senate Bill 1 interbasin permitting decisions. That memo, itself, clearly states that of the 80 interbasin transfers approved prior to Senate Bill 1, *seventy-two* or so were new water rights – were like Marvin Nichols Reservoir. The junior priority protection has no impact on *new* interbasin water rights. The junior-priority protection in Senate Bill 1 has effect only when a new interbasin transfer is proposed by amendment to an existing water right.

Of the few interbasin *amendments* identified in the TCEQ memo, at least 4 *were* given junior priority. Of the 3 that kept their original priority, 2 were uncontested and 1 ended in a settlement.[4] And the TCEQ failed to include more than *5* additional interbasin transfer amendments, *all* of which included a new, junior priority.[5]

The 80-interbasin transfer argument actually favors keeping the junior-priority protection. The junior-priority concept has been in Texas law for many decades as a method of protecting existing water rights and it hasn't stopped water from moving.

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[4] The TCEQ memo identifies 8 interbasin amendments. Of those:

- 3 did keep the original priority date, but 2 of the 3 were uncontested (no other water right holder protested). The third *was* contested and the right was allowed to retain priority through a settlement.
- 1 amendment does not even mention that the new use is interbasin.
- 1 does not specify a priority date at all, and it appears from later sworn TCEQ Staff testimony that you would presume a priority date as of the application date – a junior priority.
- 3 amendments were expressly assigned a new, junior priority date.

[5] The 80-interbasin transfer memo and the rights the TCEQ missed are documented in the binder. The rights we know the TCEQ missed are: 1 North Texas Municipal Water District authorization to sell potable water in the Sabine River Basin, 2 amendments for the Sabine River Authority, 1 amendment for the City of Texarkana, and multiple interbasin transfer amendments to the Guadalupe-Blanco River Authority's Canyon Reservoir permit.

There may be lots of reasons for fewer interbasin transfers. The new balancing procedures appropriately require a lot of evidence. Permitting backlogs at the agency because of budget shortfalls and reassignments may be having an effect. It may be that some people have been waiting for the results of regional water supply planning and adoption of the state water plan. Maybe it's simply that we don't have as much water available. Maybe all the talk about repealing the junior priority provision is causing people to wait hoping for a cheaper deal.

The junior-priority protection does not prohibit transfers It does not prevent areas of the state in need of water from getting water. The junior-priority provision does require a would-be buyer to develop its transfer project in a manner that will not diminish the supply available to existing Water users in the basin of origin.

- *We cannot dispute that, in circumstances where there is a shortage of water in the basin of origin, junior priority makes interbasin transfers of existing rights more expensive to the purchaser.*

Where junior priority makes a water right undependable in a drought, building additional storage capacity to store water in times of plenty could produce a dependable yield. Also, a purchaser can simply buy enough rights to bring total rights in balance with available supply, or work mutually advantageous arrangements with all the rights that are potentially impacted.

Even where increased cost is a disincentive to an interbasin transfer, at least the cost falls on the new use. It does not fall on other existing rights on those who are not party to the transaction. There is a fairness in that. It is appropriate.

- *The argument that an interbasin transfer is between willing buyers and willing sellers misses an important point.*

Someone who has never used all of his water or who hasn't used some of his water in a long time probably is going to be very willing to offer a good deal to a water buyer. But, in an overappropriated basin, other users, junior to the seller, likely have been using that water. Their

use will be cut off by the interbasin transfer and will not be directly compensated.

- *We have heard it argued that junior priority reduces the value of individual water rights that otherwise would be attractive for purchase by out-of-basin interests.*

But, look at those individual rights. Surface water belongs to the state. When you apply for a right to use state water you swear that you will use the water only for stated purposes and only in a specific place, and you represent that you have an actual need for water for *that* use and in *that* place. Others got in line behind you to use water and they relied on the conditions to your water right and the law that would protect them if a change in your use was proposed.

When you come back wanting to sell your water for out-of-basin use, you are trying to *change* the deal you made with the state. You don't have an absolute right to do that. Water users have been on notice for decades about junior priority in interbasin transfer. At its best, junior priority keeps a water speculator from profiting by selling water out from under somebody else's use. If the junior-priority provision makes some interbasin transfers less valuable, then certainly repealing it will make many *other* water rights less valuable.

- *What about when water is currently being used in the basin of origin?*

Where water has been actually used, or even stored, the impact of that water use already has been felt in the system. From a water rights perspective, it makes some sense to let that perfected (stored or used) water go anywhere, including out of basin, at existing time priority.

However, this argument misses a very big issue – regional impacts. If significant perfected irrigation water goes out of a river basin, for example, irrigated agriculture could die in that region for others, and water may not be there for alternative beneficial uses in that area.

- *The argument that the basin of origin can protect itself through the balancing process has some merit. That's what the balancing process is all about, and balancing has been an important part of interbasin transfer protection for decades.*

We must question, however, whether a rural area ever will win a balancing test against the big cities. And mitigation to a basin does not mean that the *individuals* who go without needed water because of the transfer between a willing buyer and a willing seller will necessarily get any relief.[6]

Even allowing interbasin transfers within a regional planning area will not protect existing water rights. For example, there are projects being pursued today that, if carried out, will involve transfers within a water planning region, but between different river basins. Water planning regions are legislative constructs where planning decisions on projects can be favored by majority rule. There are instances where an interbasin transfer of water has been recommended in a regional plan against the wishes of the area from which the water is needed for in-basin use.[7] Individual rural and agricultural water users may be as much at risk of losing their water in an interbasin transfer that is internal to a region.[8] Even regional planning boundaries can be changed, and it would be a shame if pressure was brought to bear to manipulate those boundaries in the future to support a particular project. A compromise on the junior-priority protection for transfers within regions does not seem to be a workable solution even though it might be favorable for a couple of particular projects.

- *An argument that is dangerously appealing but misguided is that water would never be allowed to move out of a basin that does not have a surplus.*

---

[6] The idea that the basin of origin can protect itself through *contracts* for sale has even less merit. There is no *entity* that is the basin of origin. The basin of origin can't enter into a contract that protects all of its parts.

[7] In the South Central Region (Region L), a transfer of water from the confluence of the Guadalupe/San Antonio River was recommended against the wishes of the area from which the water is to be transferred.

[8] In Region H, a transfer contingent on removal of the junior-priority protection is being sought to send water to Houston from the Trinity River, even though there are rice farmers needing water right now and, in fact, using the very water to be sold to Houston via the San Jacinto River Authority.

Some of the same people who say that water won't move unless there is a surplus, argue that water users won't invest in the pipelines and infrastructure necessary to bring water in from another basin if that water becomes junior and won't be there in a drought.

EXACTLY. THAT'S THE POINT. The water won't be there in a drought *because* there is not enough water in the basin of origin to dependably satisfy both other existing rights and the new transfer. If there *is* a surplus, junior priority doesn't matter – *all* water rights can be satisfied even in a drought. Repealing the junior-priority protection just means that in a drought, there won't be enough water in the basin of origin to satisfy *existing* uses for which investments already *have* been made.

- *There is a fear that the junior priority protection is putting more pressure on limited groundwater supplies.*

We haven't heard anyone come forward with specific examples. Some proposals, like ALCOA/San Antonio appear to have been on the table before Senate Bill 1. If there's pressure on groundwater supplies, at least it's not new pressure. The junior priority protection concept has been around for a long time.

Groundwater is the less regulated supply. Common sense and economic theory make it almost inevitable that water deals will go toward that supply. We also have to consider that surface-water rights and groundwater rights have very different origins. Surface water use begins with a grant from the state that it is limited when the right is granted. Groundwater use begins with a completely private right. We continue to work on our groundwater laws. Let's give those efforts a chance.

It's unfortunate that a wedge has been driven between surface water users and groundwater users. Their concerns and their issues are actually quite similar.

- *A lot of emphasis has been placed on water marketing as a solution to Texas water shortages. Repealing the junior-priority protection could encourage sales of water for interbasin use.*

On the other hand, we shouldn't want marketing for the sake of having a market. Marketing is a process, not a goal. The goal is beneficial use of water supplies in a fair system. Water going to the highest bidder in a free market may not be everybody's idea of a fair system. It's certainly not good for rural communities and irrigated agriculture.

When you consider that junior priority is an issue only when there's a shortage of water in the basin of origin, you realize that this *market* would be for moving water from one area that doesn't have enough water to another area that doesn't have enough water. Now users in the area of origin have to find new supplies and maybe there is even a second round of transactions for that. That's a heck of a market, but it's not a good vision for the state's overall water supply.

- *It must be acknowledged that there are some reasonable arguments on both sides of the interbasin transfer argument.*

On balance, the concept of protecting existing water rights that has been around for 80+ years must win out. It would be most unfortunate if the law to protect existing rights was abandoned rashly.

If the decades-old junior priority protection concept goes, and water moves, that water probably won't be coming back or won't be coming back to the basin of origin anytime soon. It will be gone to the new use. We can't just go back and fix things next session. If we allow a land-rush like grab for interbasin transfers, we won't be able to reverse it.

There may be reasons for wanting a quick repeal for one particular project or another. There are good-for-Texas reasons to move much more cautiously. We urge that the junior-priority protection NOT be repealed.

Transfers of Surface Water Rights

	Transfers Generally	Interbasin Transfers
Prior to Senate Bill 1	• Injury to existing water users considered actual historical use (at least when challenged). • Standard was implied from statutory permitting provisions; implied from the *Briscoe* case; stated by various water rights scholars; and implied by TNRCC Rules § 295.158 for notice of change of place of use.	• Water Code § 11.085 stated no person may divert water from one watershed to another "to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted." • § 11.085 was interpreted by Supreme Court as requiring a two-part test: first you protect all existing water rights, junior or senior; then you balance the need for the water remaining.
Senate Bill 1	• Added "four corners" test as the new no-injury standard. (Water Code § 11.122). • Requires comparison of changed use to maximum paper right. • Standard generally rejected in the other western states. • May have constitutional problems.	• "No prejudice" language repealed. • Any proposed interbasin transfer or any existing water right is junior in priority to water rights granted before the transfer. (Water Code § 11.085(s) and (t)). • Balancing test to consider factors in regional plan that include historic use. (Water Code § 11.085(k)(2)(F)).

JUNIOR PRIORITY FACTS

- Without the junior priority language, the donor basin loses both the water transferred and dependability of the water rights retained in the basin.

- If there is sufficient water in the basin for all water rights, the junior priority does not appreciably diminish the value of the water transferred

- The junior priority language prevents interbasin transfers from expanding the scope of a water right (purpose of use, place of use, and the amount of water) to the detriment of other water rights in the basin.

- Deletion of the junior priority language removes the protection of water rights provided by Texas water law prior to Senate Bill 1. As stated by Texas Tech Law Professor and Texas water law treatise author, Dr. Frank Skillern, assigning junior priority or other limiting conditions having the same effect to water rights transferred out of the basin was the law in Texas prior to Senate Bill 1.

- The junior priority does not affect projects approved by the State to supply out-of-basin water needs. Junior priority only applies when a water right is amended to allow use of water in a manner not allowed by the original permit.

- The junior priority has no effect on new water supply projects. All new water projects have a priority date based on the date of filing the application for the permit for the project, whether the water is to be used in the basin or out of the basin.

- The junior priority language does not make a transferred water right perpetually junior to all inbasin water rights. The transferred right is junior only to water rights in existence at the time the application for the transfer is accepted for filing at the TNRCC.

- Some have claimed that the junior priority results in a taking of property. This is not true. Junior priority does not apply to rights previously granted by the State to the water right holder. It applies only to the grant of additional rights to the water right holder from the State.

- The Garwood Irrigation Company sale would have reduced the water supply of one water right holder in West Texas by approximately 10,100 acre-feet per year. This is enough water to serve more than 60,000 people in a water-short region. Private arrangements were made to eliminate this impact in exchange for dismissing the protest. Nothing in present or existing law required the settlement, and the area might not be so lucky the next time. There remain a significant number of very senior Colorado River water rights that remain marketable for out of the basin use.

- The municipal and industrial uses supplied by surface water suppliers in the Brazos Basin could be impaired by the sale of irrigation rights for use outside the basin.

- A balancing test is no replacement for the absolute prohibition against allowing interbasin transfers that injure existing water rights in the donor basin that existed in Texas before Senate Bill 1 and is carried forward in Senate Bill 1. The needs of a small farmer, city or industry are unlikely to win a balancing test with a big city.

  Although Water Code § 11.085 allows for compensation to the donor basin, there is no requirement for such compensation and the donor basin is not the owner of the rights being sold. For this reason, it is likely that there will be no compensation to anyone but the seller of water rights.

  All the junior priority provision does is insure that the donor basin's water rights will be protected in time of shortage to the same degree that they would have been protected prior to the transfer.

RIVER BASIN CONSEQUENCES OF JUNIOR PRIORITY

Brazos River: If sales of unused or underused irrigation water rights occur without junior priority, industrial and municipal water right holders in the Brazos Basin will be forced to buy more water from Brazos River Authority ("BRA") or develop other supplies to make up the shortfall from the transfer. Similarly, Brazos Port Water Authority will have to make up the shortfall to their customers in the Lake Jackson area. The transfer of the irrigation rights could also reduce the yield of BRA reservoirs that supply water to Waco, Temple, Belton, Round Rock, Georgetown, and Granbury by increasing the amount of water that would have to be passed.

Colorado River: If sales of unused or underused irrigation water rights occur without junior priority, the West Texas cities that depend on water from their own reservoirs or those of Colorado River Municipal Water District will have to find an alternative supply to make up for the shortage. This likely will be groundwater that will be mined at sites far from the cities at great expense, not only to the cities but also to the persons currently dependent upon the groundwater that will be targeted by the cities. The City of Austin, having its own water rights, will have to purchase more water from Lower Colorado River Authority. Recreational interests on the Highland Lakes will have to suffer from more frequent periods of lower lake levels.

Guadalupe River: If sales of unused or underused irrigation water rights occur without junior priority, the City of Victoria's investment in its $30 million surface water treatment plant will be diminished and its partial reliance on groundwater mining will continue. In-basin industries' multimillion-dollar investment in their water systems and industrial facilities will be diminished, increasing the groundwater mining of the aquifer or requiring purchases of more water from Guadalupe-Blanco River Authority.

Trinity River: If sales of unused or underused irrigation water rights occur without junior priority, Trinity Basin water right holders primarily in the Dallas/Ft. Worth metroplex could have the reliability of their rights reduced, requiring the development of expensive new water supplies sooner than necessary. Further, the metroplex's future water supply will likely come from East Texas. East Texas water can be obtained without removing the junior priority protection and the major metroplex wholesale water suppliers do not support its removal.

WHAT JUNIOR PRIORITY MEANS TO UPPER COLORADO RIVER BASIN REGION

- Without the private arrangement with Lower Colorado River Authority, which has the same effect as junior priority, the Garwood Irrigation Company transfer would have reduced the future water supply of Colorado River Municipal Water District ("CRMWD") by approximately 10,100 acre-feet per year (enough water to serve more than 60,000 people).

- This estimate of impact only considers impact to CRMWD reservoirs. Other reservoirs such as Twin Buttes, Lake Nasworthy, Lake Brownwood, Lake Coleman, Lake O.C. Fisher, Champion Creek, and Lake Colorado City also would likely be adversely impacted.

- The 10,100 acre-feet per year impact was estimated by CRMWD's consultants. Every 1,000 acre-feet of water that is lost from the region means that 6,000 fewer people can be supplied.

- The only other estimate of the potential impact of the Garwood transfer only considers the impact on the City of Austin (the most senior municipal water right along the Colorado River). Even so, this estimate substantially underestimates the impact on Austin because it evaluates the impact from changing the use of water from irrigation to municipal while ignoring the more substantial impact that will result from use of water that was historically never used.

- There are other senior water rights on the Lower Colorado River that could be transferred and, absent the junior priority, could reduce the region's water supply by tens of thousands of acre-feet.

EFFECT OF JUNIOR PRIORITY
(Hypothetical Basin)

			Dry Year		Wet Year	
Water User	Permitted Amount	Max. Historical Use	After the Transfer without Junior Priority	After the Transfer with Junior Priority	After the Transfer without Junior Priority	After the Transfer with Junior Priority
City A (1910)	25,000	25,000	25,000	25,000	25,000	25,000
Farmer B (1920)	25,000	25,000	25,000	25,000	25,000	25,000
Seller C (1930)	50,000	5,000	5,000	5,000	5,000	5,000
C's Buyer			45,000	20,000	45,000	45,000
Farmer D (1940)	15,000	15,000	0	15,000	15,000	15,000
Town E (1950)	10,000	10,000	0	10,000	10,000	10,000
In-Basin Use		80,000	55,000	80,000	80,000	80,000
Out-of-Basin Use			45,000	20,000	45,000	45,000
Total	125,000	80,000	100,000	100,000	125,000	125,000

All Values in Acre-Feet Per Year

Average Year: 100,000 Acre-feet/yr of Water Available

Water Rights in Order on Stream with Time Priority	Max. Historical Use	After C Sells 20,000 ac-ft/yr Water Right For Out-of-Basin Use
A 1910 Permit (25,000 ac-ft/yr)	25,000	25,000
C 1930 Permit (25,000 ac-ft/yr)	5,000	5,000 = C's Use 20,000 = C's Buyer
B 1920 Permit (25,000 ac-ft/yr)	25,000	25,000
E 1950 Permit (25,000 ac-ft/yr)	20,000	0
D 1940 Permit (25,000 ac-ft/yr)	25,000	25,000
	Total Historical Inbasin Water Use = 100,000 ac-ft/yr	Total Inbasin Water Use After Sale = 80,000 ac-ft/yr

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Water Rights in Texas

❖ Ownership of Water Rights

Groundwater:

Outside groundwater districts, and unless rights in groundwater were previously severed from the land, a landowner may pump all the water he wants subject to limited restrictions on waste and land subsidence.

Surface Water:

Flowing surface water is "owned" by the State and held in trust for the public. The State grants to individuals the right to store and use water, under statutory standards, and with express conditions.

Surface water rights granted by the State to individuals are rights of use, that are real property interests. Rights become "vested" or "perfected" to the extent water is beneficially used. Rights that go unused are subject to cancellation by the State. Until an unused right is cancelled, the holder can continue to perfect its right up to the maximum amount of use authorized, under the terms and conditions imposed.

Water that is reduced to possession becomes personal property, but it still is subject to state-imposed conditions of use.

❖ Standards for Granting a Water Right

When a new right to appropriate state water is granted, Water Code § 11.134, among other provisions, requires that the following considerations be satisfied:

- unappropriated water is available;
- no impairment of existing water rights;
- evidence of conservation;
- finding that not detrimental to the public welfare;
- environmental and water quality impacts considered;
- hydrologic connection with groundwater considered; and

- consistent with regional/state water planning.

❖ Scope of a Surface Water Right

The scope of the right to surface water is limited strictly to the terms of the appropriation. A surface water right typically specifies:

- source of supply;
- the purpose for which water may be used (municipal, industrial, irrigation, recreation . . .);
- the place where water may be used, including whether use is authorized in a different basin;
- the location and rate at which water may be diverted from a watercourse;
- the authority to store or "impound" water in a reservoir, if any; and
- time priority.

Special conditions also may be added at the time water is appropriated, for a number of reasons including to protect other water rights and for environmental and water quality protection, or to require return of surplus water.

❖ Time Priority of a Surface Water Right

A critical element of all surface water rights is the time priority of appropriation. In Texas, the first in time is the first in right. A "senior" water right will be satisfied up to his actual need for water before the next in time, or "junior" water right has the right to store or divert water. A water right simultaneously is junior to those who came before and senior to those whose rights were granted after.

The priority system is more difficult in practice than in theory, partly because the right of appropriation attaches to "flow" as much as to "volume." One article describes that the effect of an appropriator's use on streamflow is a complex product of rate of diversion; point of diversion; amount of water diverted; the times or seasonality of diversion; amount, place and timing of return flows; and other factors.

❖ Transfers of Existing Surface Water Rights

A water right holder has an absolute right to sell the water right for the same purpose and place of use. When the sale is for a *different* purpose and place of use, then the State's authority again is involved. The State must ensure both that the changes proposed do not harm other water appropriators and that the change is not detrimental to the public welfare. Both of these standards traditionally have been implied from statute and expressed in court opinion. By express statute, the State also will look at the impact of the change on environmental values.

❖ Injury to Other Water Rights

Injury occurs if another appropriator is deprived of the pre-transfer quantity and quality of water available; if another appropriator's legal obligation to senior water right holders is increased; or if the continuation of stream conditions as they existed at the time of the person's appropriation is affected substantially, for example. Such injuries can be caused by a changed point of return flow; an increased diversion rate; an increased rate of consumption; a change in seasonal patterns of use, for example from the irrigation growing season to steady municipal use; a change in stream conveyance losses; or a change that alters the order of diversion from a stream, among other things.

The fact that these or other injuries would occur from a change of use does not preclude a transfer, however. Amendments may be granted with special conditions, such as limitations on what minimum flow must be maintained past the changed diversion point to protect downstream water users and environmental values. An amendment also may subordinate the time priority of the transferred right to those existing rights that are injured.

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INTERBASIN TRANSFERS IN TEXAS

Booth, Ahrens & Werkenthin, P.C.

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Interbasin Transfers in Texas

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Water Marketing in Texas

- In-Basin
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California Water Plan

The initial rush of enthusiasm for water marketing stimulated much discussion about supposedly unused water. Some water users in the State hold rights to more water than they currently use to meet their needs. Why not sell those rights to others?

Such arrangements looked attractive to both prospective sellers and buyers. The sellers would receive payment for something they were not using, while the buyers would meet urgent water needs. This view, however, overlooks the fact that water to meet the transferred rights has been part of the basin supply all along, and has almost always been put to use by downstream water right holders or is supporting an environmental need. This type of marketing arrangement became known as a "paper water" deal: the money goes to the seller, while the water is sold to the buyer from the supply of an uninvolved third party.

In analyzing water marketing and water conservation proposals, the Department uses the terms real water and new water to contrast with paper water. Real water is water not derived at the expense of any other lawful user, i.e., water that satisfies the Water Code's no injury criterion. New water is water not previously available.

Senate Bill 1

- Passed in 1997
- Significant Unresolved Issues:
  - Interbasin Transfers
    - New Permits
    - Amendments
  - In-Basin Permit Amendments
    - "Four-Corners Doctrine"
  - Water Reuse
    - Reuse after discharge into a watercourse

Texas Water Code § 11.085 (prior to SB 1)
Interwatershed Transfers

(a) No person may take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, watercourse, or watershed in this state into any other natural stream, watercourse, or watershed *to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted.*

(b) No person may transfer water from one watershed to another without first applying for and receiving a permit from the commission to do so. Before issuing such a permit, the commission shall hold a hearing to determine the rights that might be affected by the transfer. The commission shall give notice and hold the hearing in the manner prescribed by its procedural rules.

(c) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $100 nor more than $500 or by confinement in the county jail for not more than six months.

(d) A person commits a separate offense each day he continues to take or divert water in violation of this section.

Case Law

- *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752 (Tex. 1966):
  - Established two-part test before an interbasin transfer could be authorized:
    - Would existing water rights in the basin of origin be impaired by the transfer? If there would be impairment, there could be no transfer.
    - To the extent water remains in the basin of origin in excess of that required to protect existing rights from impairment, then, as to that excess water, the future benefits and detriments expected to result from the transfer must be balanced. If the benefits outweigh the detriment, the transfer can go forward.

Commentators

- Interbasin transfers are junior in time to water rights existing at the time of the amendment to authorize the transfer. 1 Frank Skillern, Texas Water Law 82-83 (1988).

TNRCC Interpretations

- In the past, TNRCC made new transfers and most amendments junior in priority to all water rights existing at the time of the transfer.
- Mackenzie Municipal Water Authority's permit amendment to authorize transbasin diversions and use:
  - "Section 11.085 indicates that transwatershed [interbasin] diversions have the potential for harming water rights in the basin of origin. The amendment, therefore, is in the nature of a 156.04.10.001-.002 amendment and *should be given a new priority date."* TDWR Memorandum re: Mackenzie Municipal Water Authority Application to Amend Permit No. 2297 to authorize transbasin diversions and use 2 (July 13, 1982) (on file with TNRCC) (emphasis added).

Other Permits

- Sabine River Authority's Lake Tawakoni and Lake Fork water rights
- Guadalupe-Blanco River Authority's Canyon Reservoir water rights
- City of Texarkana's Wright Patman Reservoir water rights
- Franklin County Water District's Lake Cypress Springs water rights
- City of Clyde's Lake Clyde water rights

Regulatory Guidance

– Prior drafts of TNRCC's Regulatory Guidance Document show that as recently as 1994, TNRCC staff felt that amendments to water rights seeking interbasin transfer authorization should be "subordinate [junior] to existing water rights." Tex. Natural Res. Cons. Comm'n, Draft of *A Regulatory Guidance Document for Applications to Divert, Store or Use State Water* 5 (March 1994).

SB 1 Rewrites Interbasin Transfer Law

- TNRCC Commissioners Initiate Changes
  - TNRCC desires to improve on the very general balancing test in Water Code § 11.085 and to provide specific requirements and hearing procedures
- Initial Drafting
  - Absolute protection for existing water rights dropped in favor of a balancing test between the two basins for impacts to water rights and other interests

SB 1 Rewrites Interbasin Transfer Law (cont' d)

- Legislative Hearings on SB 1
  - –Impact of elimination of absolute protection for existing water rights standard from an interbasin transfer added to an existing right in favor of a balancing test was not initially apparent to persons not involved in TNRCC' s permit process
  - –By the time that SB 1 made it to the House, enough awareness existed such that the House amended the Senate version to protect existing water rights from interbasin transfers and restore the protections in existing law

SB 1 Rewrites Interbasin Transfer Law (cont' d)

- Final Language
  - House-passed version of SB 1, and final version added following language to Water Code § 11.085:

    "Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing." Tex. Water Code Ann. § 11.085(s) (Vernon 2000)

Dilemma Facing Legislature and Water Planners Today

- Treating water as a simple commodity flowing to highest bidder will disadvantage smaller cities, rural areas and agriculture that cannot count on winning balancing tests against the State' s largest cities.
- Larger cities having plenty of water may lose out to cities having an immediate need.
- If interbasin transfers of underutilized senior water rights are the least expensive supply, those transfers will be pursued first before development of in-basin reservoir projects. And, why not? Those in-basin projects still will be available even when out-of-basin supplies are exhausted.
- Interbasin transfers are not "least-cost" when factoring in the long-term costs to the basin of origin to find a future water supply (when before the transfer there was an adequate supply) and, just as significantly, the costs to individual water right holders who stand to lose their supplies if not protected.

Solution: Regional Planning that Emphasizes New and "Real" Water

- SB 1 put into motion a significant regional water planning process that can lead the way to meeting all of Texas' water supply needs.
- SB 1 also required state agencies to perform new water availability modeling studies (WAMs) to develop adequate information about existing water uses and supplies.
- Until the impacts of interbasin transfers can be fully calculated by the new WAMs, it would be a mistake to leave existing water right holders and regional economies at risk by repealing the junior priority protection and allowing a land-rush-type grab for interbasin transfers.
- Transferring water away from some users to supply others will not solve Texas' future water needs. Only conservation, water reuse and increasing the quantity of the overall dependable water supply are real solutions to Texas' water needs.

Common Arguments Heard in the Junior Priority Debate

- Willing Buyer and Willing Seller.
  - Interdependency of surface water rights not recognized, i.e., flow left unused is likely long used by junior rights.
- Transfers will only occur from areas of the State that have surpluses of water.
- Junior priority protection prohibits the receiving basin from getting a water supply that is dependable in a drought.
  - Both of these claims cannot be true. If there truly is a surplus of water, even the most junior of rights will be satisfied in the driest of times.
- Junior priority provision makes water rights otherwise available for sale to a new user worthless.
  - Then, repeal of the protection would make at least some of the rights of existing users worthless by parallel reasoning. Fairness would seem to dictate that the burden fall on the willing seller and willing buyer who would change the basis on which the water rights were granted in the first place.

Common Arguments Heard (cont' d)

- Junior priority language makes it harder to obtain an interbasin transfer.
  - It is a black and white rule unlike the many subjective criteria found in the rest of § 11.085 after SB 1's changes.
- Junior priority language is impediment to even interbasin transfers for new permits.
  - The junior priority protection does not impact new permits and construction of new reservoirs for interbasin transfers—new permits and reservoirs would have a new priority anyway.
  - The priority change only benefits water rights existing at the time of the proposed transfer--not future permits that might be issued or amended after the permit is amended or issued.
    - An interbasin transfer, once approved, is not perpetually junior in time even to in-basin permits issued after the interbasin transfer amendment.

Common Arguments Heard (cont' d)

- Junior priority protection is not a taking of a water right holder's property.
  - A water right holder's property is not taken when adding a new interbasin transfer if a junior priority is required for the new transfer due to the nature of the property interest in water. The water right grant by the State only allows a use for a particular purpose and place of use. Case law holds that TNRCC can deny or modify water rights if a significant change in purpose or place of use is requested.
- Removal of junior priority protection is necessary to protect groundwater resources.
  - Today's pressure on groundwater resources is a result of ready availability and the ease of developing an unregulated or lightly regulated resource vs a highly regulated resource in surface water.
  - Such pressure will exist with or without junior priority.

Common Arguments Heard (cont' d)

- TNRCC precedent prior to SB 1 supports removal of junior priority protection (TNRCC 9/23/97 Memo):

  TNRCC staff prepared a memo discussing 80 or so interbasin transfers that have been issued and some of the few amendments to an existing right that authorized a new interbasin transfer.

  Overwhelming majority of the interbasin permits were new permits that would have a junior priority anyway.

  In the 8 specific amendments discussed in the memo, TNRCC in some cases imposed a junior priority but in somecases did not.

  Of the 8 interbasin transfer amendments approved prior to SB 1 and discussed in the memo, three were given junior priority, one did not mention the time priority, one did not mention that the transfer was interbasin (it was for potable water), one was contested and allowed to retain its original priority date only after a settlement was reached with the protestants, and two retained the original priority date but were uncontested.

Common Arguments Heard (cont' d)

The memo fails to discuss the MacKenzie application's staff memo that clearly states that junior priority was required by law.

The memo omits discussion of the multiple interbasin transfer amendments to GBRA's Canyon Reservoir permit that were given a junior priority as well as the amendments to three water rights, two for Sabine River Authority and one for City of Texarkana, that also imposed a junior priority on the particular interbasin transfer amendment.

Common Arguments Heard (cont' d)

The memo failed to discuss an amendment to the Garwood Irrigation Company water right where TNRCC, in anticipation of a future amendment to allow for an additional interbasin transfer, stated:

"Nothing herein shall be construed to be a determination by the Commission that it will grant any future application by certificate owner, or by any other water right holder, to amend any water right to change the place of use, purposes of use, point of diversion, annual diversion or rate of diversion authorized under the water right as it exists at that time. All issues that may be relevant to any such proposed amendment and the impact of such amendment on other water right holders, *including priority dates*, shall be considered by the Commission at that time. . . ."

Common Arguments Heard (cont' d)

Since the majority of amendments adding an interbasin transfer that have been discovered were given a junior priority, it makes more sense to argue that politics, ignorance or lack of protests was the reason that the priority dates were not changed in the few permits that maintained the priority rather than that TNRCC precedent prior to SB 1 did not support inclusion of the junior priority language.

Summary

- Unless the intent of the legislature is to eliminate the past and current § 11.085's protection from amendments for existing water rights, there is no historical reason not to continue to include a junior priority provision.
- Without the junior priority language or some substitute, the absolute protection of existing water rights in the originating basin, as recognized by the Texas Supreme Court, would be eliminated in favor of a balancing test.
- Little protection for existing water rights would be afforded by general transfer law, i.e., the "four-corners doctrine," that exists after SB 1 removed most historical protections from in-basin water right amendments.
- Other water right holders who have relied on the continued existence of the status quo of the other water rights in the basin would be denied their right entitling them to protection from interbasin transfer amendments with the historical "no prejudice" protections.

Conclusion

- The junior priority provision does not prohibit transfers. It does not prevent areas of the State in need of water from getting water.
- The junior priority protection does require a would-be buyer to develop its transfer projects in a manner that will not diminish the supply available to existing water users in the basin of origin.
  - Storing water in times of plenty and investing in infrastructure for conveyance of supplies can accomplish that.
- Without the junior priority protection, the great majority of transfers would leave less water for junior water rights in the basin of origin during dry periods after the interbasin transfer.
- Remember, only one water right in the basin is senior to all other water rights, so the universe of potentially impacted permits is large.

SPEECH

INTERBASIN TRANSFERS IN TEXAS

by

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Introduction

Just a few short years ago, the Texas Legislature and communities all over the State were focused on water supply issues as omnibus water legislation passed into law under the caption of Senate Bill 1 ("SB 1"). Provisions of SB 1 literally touched every part of Texas. Attempts last legislative session--and no doubt this coming session--to undo a key provision of SB 1 regarding transfers of water from one area of Texas for use in another is receiving only little public attention by comparison. Yet, today, at the State Capitol and among water providers, sentiment about "interbasin transfers" still runs high. At stake is whether existing surface water uses in a river basin or new uses in another river basin will suffer first in a drought after a transfer of an existing senior right.

The time priority of individual surface water rights determines who may divert or store water first in a drought and who may do so next. New projects always are the most junior in time priority when a new water right is granted by the State. But a more difficult question arises when an old right, perhaps even a historically unused one, is sold for a new use. Water rights are granted by the State of Texas with express conditions for purpose and place of use, and with a requirement that the water be put to beneficial use. Changes in purpose or place of use, among other changes, require a new state action under statutory standards.

For more than eighty years, Texas law allowed no prejudice to persons or property when water was transferred to a new use outside a river basin. In effect, during a drought, satisfaction of basin of origin water rights existing at the time of the transfer would be assured by the State before the new out-of-basin use would be allowed. Changes to the interbasin transfer statute were initiated by the Texas Natural Resource Conservation Commission ("TNRCC") Commissioners desiring to improve on the very general balancing test in Texas Water Code § 11.085 and to provide specific requirements and hearing procedures. Somehow, during the development of the first version of SB 1, the absolute protection to existing water rights was dropped from the proposed law in favor of a balancing test between the two basins for impacts to water rights and other interests, such as environmental and socioeconomic.

The problem in understanding what was occurring to the protection of existing rights is that, without actually having been involved in the arguments at the TNRCC over how to interpret the prior law for water right amendments adding a new interbasin transfer during the permitting process, it was very difficult to understand just what the Senate-passed version of SB 1 would have done to the protection afforded in-basin water rights from an interbasin transfer added to an existing right. Problems of interpretation were compounded when the TNRCC staff failed, at least in public hearings, to put before the legislature the TNRCC's and its predecessor agencies' (collectively, "Commission") past policy of requiring a junior priority in many cases for an interbasin transfer amendment. While sufficient time was not available to make this point clear in

the Senate, by the time that SB 1 made it to the House, there was enough awareness that without the House-passed version's amendments protecting existing water rights from interbasin transfers, the protections in existing law would have been eliminated. Over time, the result would be a significant reallocation of water in many river basins, including the Guadalupe, Colorado, Brazos, Trinity, and Neches River Basins. In the House-passed version of SB 1, and ultimately the final version, the following language was added to § 2.07 as Water Code § 11.085(s):

> Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing.

TEX. WATER CODE ANN. § 11.085(s) (Vernon 2000).[1]

Debate in the legislature has demonstrated clearly that those who urge repeal of the junior priority protection would treat water as a simple commodity flowing to the highest bidder. Many Texans feel that, to the contrary, water is a precious resource essential to Texas' future and that rural and agricultural Texas as well as the smaller cities cannot count on winning balancing tests against the capacity of this State's largest cities for growth. Even those from areas of Texas that rely on groundwater resources can analogize to the impact that well fields built for distant use can have on individual well-owners and regional economic viability.

Testimony supporting repeal of the junior priority protection revealed a bottom-line approach that some metropolitan areas will take for buying existing water rights. If interbasin transfers of underutilized senior water rights are the least expensive supply, those transfers will be pursued first, before development of in-basin reservoir projects. And, why not? Those in-basin projects still will be available even when out-of-basin supplies are exhausted. Interbasin transfers are not "least-cost" when one factors in the long-term costs to the basin of origin to find a future water supply (when before the transfer there was an adequate supply) and, just as significantly, the costs to individual water right holders who stand to lose their supplies if not protected.

Transferring water away from some users to supply others will not solve Texas' future water needs. Only conservation, water reuse and increasing the quantity of the overall dependable water supply can be real solutions.

The junior priority provision does not prohibit transfers. It does not prevent areas of the State in need of water from getting water. The junior priority protection does require a would-be buyer to develop its transfer projects in a manner that will not diminish the supply available to existing water users in the basin of origin. Storing water in times of plenty and investing in infrastructure for conveyance of supplies can accomplish that.

SB 1 put into motion a significant regional water planning process that can lead the way to meeting all of the water supply needs of the State of Texas. As part of this process, the legislation also required state agencies to perform new water availability studies since the State does not now have adequate information about existing water uses and supplies. The results of this important work will not be completely known for a few more years. Until the impacts of interbasin transfers can be fully calculated, it would be a mistake to leave existing water right holders and regional economies at risk by repealing the junior priority protection. The effects of a land-rush type grab for interbasin transfers, before the impacts can be meaningfully evaluated, could not be reversed easily, assuming that courts would allow such a change to apply retroactively to existing water rights.

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[1] A similar limit applying only to the Colorado River Basin can be found at § 11.085(t).

Interbasin Transfer Law Prior to SB 1

As mentioned, before SB 1, Water Code § 11.085, the law regarding interbasin transfers, contained an absolute protection for existing water rights *and* a general balancing test between the two basins. Interbasin transfers of water that "prejudice" any person or property within the basin of origin were prohibited. TEX. WATER CODE ANN. § 11.085. This provision was in effect from 1913 until the passage of SB 1 when the junior priority provision was substituted. The Supreme Court has held that this provision means that existing water rights cannot be impaired. *See City of San Antonio v. Texas Water Comm'n,* 407 S.W.2d 752, 758 (Tex. 1966). The San Antonio case established a two-part analysis that had to be used under § 11.085 prior to SB 1 before an interbasin transfer could be authorized:

- Would existing water rights in the basin of origin be impaired by the transfer? If there would be an impairment, there could be no transfer.

- To the extent that there is water in the basin of origin in excess of that required to protect existing rights from impairment, then, as to that excess water, the future benefits and detriments expected to result from the transfer must be balanced. If the benefits outweigh the detriment, the transfer can go forward.

Id. Additionally, other case law and commentators have stated that under the pre-SB 1 version of § 11.085, interbasin transfers are junior in time to water rights in existence at the time of the amendment to authorize the transfer. FRANK SKILLERN, TEXAS WATER LAW, ch. 3 at 82-83 (Sterling Press 1988) (citing *Halsell v. Texas Water Comm'n,* 380 S.W.2d 1, 14 (Tex. Civ. App.–Austin 1964, writ ref'd n.r.e.)).

In the past, the Commission made new transfers and most amendments junior in priority to all water rights existing at the time of the transfer. Attached is a Commission staff memorandum discussing how a water right amendment seeking to add an interbasin transfer would be junior in priority to existing water rights both junior and senior to the one that is being amended. *See* **Attachment 1.** This memorandum states:

> Section 11.085 indicates that transwatershed [interbasin] diversions have the potential for harming water rights in the basin of origin. The amendment, therefore, is in the nature of a 156.04.10.001-.002 amendment and *should be given a new priority date.*

Memorandum from Gwen Webb, Attorney, Texas Dep't of Water Resources, to The File, re: Mackenzie Municipal Water Authority Application to Amend Permit No. 2297 to authorize transbasin diversions and use 2 (July 13, 1982) (on file with TNRCC) (emphasis added). Also, attached are permits where the Commission granted permit amendments seeking an interbasin transfer with a new junior priority. *See* **Attachment 2.** Prior drafts to the TNRCC's Regulatory Guidance Document show that as recently as 1994, the TNRCC staff felt that amendments to water rights seeking interbasin transfer authorization should be "subordinate [junior] to existing water rights." Tex. Natural Res. Cons. Comm'n, Draft of *A Regulatory Guidance Document for Applications to Divert, Store or Use State Water* 5 (March 1994). *See* **Attachment 3.** The final draft of the Regulatory Guidance Document curiously removed this section from the document despite its accurate representation of Commission precedent. As also can be seen by the TNRCC's current Regulatory Guidance Document, the TNRCC, under its general authority, did require plans and studies that now will be specifically required by statute and, in fact, be more comprehensive. *See* **Attachment 4.**

The TNRCC staff, perhaps in response to previous versions of this paper criticizing the TNRCC's failure to admit to past precedent, subsequently prepared a memorandum discussing eighty or so interbasin transfers that have been issued and some of the few amendments to an existing right that authorized a new interbasin transfer. The TNRCC memorandum has been cited in speeches and legislative testimony and comment to primarily suggest that interbasin transfers are common and occasionally to suggest that the junior priority language was not based on prior law or precedent.

Initially, it should be remembered that the overwhelming majority of the interbasin permits were new permits that would have a junior priority anyway. It is only in amendments to water rights seeking to add a new interbasin transfer where the junior priority issue becomes important. In the eight examples discussed in the TNRCC memorandum, the Commission in some cases imposed a junior priority but in some cases did not. Summarizing the TNRCC memorandum's results of the eight interbasin transfers approved prior to SB 1 that were found in TNRCC records, three amendments were given junior priority, one amendment did not mention the time priority, one amendment did not mention that the transfer was interbasin (it was for potable water), one amendment was contested and allowed to retain its original priority date only after a settlement was reached with the protestants, and two amendments retained the original priority date but were uncontested. ***See* Attachment 5.** The attempt in the memorandum to distinguish the MacKenzie MWA and Franklin County Water District permits (contained in Attachment 2 herein) by asserting that the priority changes occurred prior to the adjudication appears to be an effort to rationalize the TNRCC staff's incorrect statements to the legislature last session rather than a reasoned argument. The stream adjudication has nothing to do with a priority determination. The TNRCC also fails to discuss the MacKenzie application's staff memo that clearly states that junior priority was required by law. The TNRCC memorandum's statement that the failure to set out a time priority means that the original date is assumed contradicts sworn testimony by TNRCC staff who testified that if the amendment is silent, the priority date is the date that the application was filed; that is, junior. Similarly, it is unknown whether the Commission was aware of the interbasin transfer in the North Texas MWD authorization to sell potable water in the Sabine River Basin. Also, the TNRCC memorandum omits discussion of the multiple interbasin transfer amendments to the Guadalupe-Blanco River Authority's Canyon Reservoir permit that were given a junior priority, as well as the amendments to three water rights, two for the Sabine River Authority and one for the City of Texarkana, that also imposed a junior priority on the particular interbasin transfer amendment. These permits and amendments are included herein. *See* **Attachment 6.**

While, at the time, not an amendment seeking a new interbasin transfer, the TNRCC's treatment of the City of Corpus Christi's first amendment to the Garwood Irrigation Company water right after its purchase of a portion of the right also is instructive. Initially, a change of use was authorized by the TNRCC for the Garwood right allowing for municipal and industrial use but only in the Garwood service area. This authorization was issued without notice. In that amendment, the TNRCC, in anticipation of the future application for an interbasin transfer, stated:

> Nothing herein shall be construed to be a determination by the Commission that it will grant any future application by certificate owner, or by any other water right holder, to amend any water right to change the place of use, purposes of use, point of diversion, annual diversion or rate of diversion authorized under the water right as it exists at that time. All issues that may be relevant to any such proposed amendment and the impact of such amendment on other water right holders, *including priority dates*, shall be considered by the Commission at that time. Notice of any such application shall be given by the Commission to any affected person that gives the Commission a written request for such notices.

(Emphasis added). When the water right was subsequently sought to be amended to authorize use in Corpus Christi and elsewhere out of the basins previously authorized for use, the City of

Austin, Colorado River Municipal Water District and others protested the amendment saying that, among other things, the transfer should be junior. The protests were dropped only after the purchaser of the rest of the Garwood water right, the Lower Colorado River Authority, agreed to protect Austin and CRMWD from any impacts caused by the Corpus Christi transfer.

Of the small universe of permits at the Commission that have been amended to allow an interbasin transfer without a priority change, it makes more sense to argue that politics, ignorance or a lack of protests was the reason that the priority dates were not changed rather than that Commission precedent prior to SB 1 did not support inclusion of the junior priority language. This is particularly true in light of the staff memo in the MacKenzie application. In any event, the majority of amendments adding an interbasin transfer were given a junior priority, and the TNRCC has never, in any public meeting, acknowledged the Commission precedent as it existed on this subject prior to SB 1.

Unless the intent of the legislature is to eliminate the past and current § 11.085's protection from amendments for existing water rights, there is no historical reason not to continue to include a junior priority provision.

Myths

Besides the misinformation regarding the law on interbasin transfers prior to SB 1's passage, there are reoccurring statements made about the effect of the junior priority language on future interbasin transfers.

Proponents of interbasin transfers emphasize that trade in state-granted water rights is between "willing buyers and willing sellers." This argument has facial appeal but is too simplistic. Yes, an entity that holds surface water rights which have never been used and are otherwise subject to cancellation by the State, or are no longer needed, will be willing to sell water rights at a good price. However, surface water rights are interdependent, and flow that has been left unused or returned to the stream likely has been long used by rights that are more junior in time priority. The seller could reap its profit while the supply is taken away from other water users who are not party to the transaction. The rights of those other water users have historically been entitled by law to protection. *See State Bd. of Water Eng'rs v. Slaughter,* 382 S.W.2d 111 (Tex. Civ. App.–San Antonio 1964), *writ ref'd n.r.e.,* 407 S.W.2d 467 (Tex. 1966) (rights acquired under prior irrigation act were vested rights that legislature could not constitutionally cut off); *see also San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa,* 972 P.2d 179 (Ariz. 1999) (legislation may not disturb vested water rights by retroactively changing the law to lessen protection given to junior water rights over senior water rights that may have been abandoned or terminated by of operation of prior law).

Some interbasin transfer promoters make a fatally inconsistent argument. They claim that transfers will only occur from areas of the State that have surpluses of water. They also claim that the junior priority protection is harmful because it means that the receiving basin would not be getting a water supply that is dependable in a drought. Both of these claims cannot be true. Think about it. If there truly is a surplus of water, even the most junior of rights will be satisfied in the driest of times. If, as one author of legislation to repeal the junior priority provision argued, the provision makes water rights otherwise available for sale to a new user worthless, then repeal of the protection would make at least some of the rights of existing users worthless by parallel reasoning. Fairness would seem to dictate that the burden fall on the willing seller and willing buyer who would change the basis on which the water rights were granted by the State in the first place.

The junior priority language does not make it any harder to obtain an interbasin transfer. It is a black and white rule unlike the many subjective criteria found in the rest of § 11.085 after SB 1's changes. The junior priority language also, as discussed above, does not impact new permits and construction of new reservoirs for interbasin transfers, since new permits and reservoirs would have a new priority anyway. Further, the priority change only benefits permits existing at the time of the proposed transfer--not future permits that might be issued or amended as is sometimes asserted. An interbasin transfer once approved is not perpetually junior in time even to in-basin permits issued after the interbasin transfer amendment.

A property right argument sometimes is made that a water right holder seeking to add a new interbasin transfer to his water right is having his property taken if a junior priority is required for the new transfer. This argument is nonsense. Remember, the State owns surface water. The water right grant by the State only allows a use for a particular purpose and place of use. The TNRCC, in fact, can deny in some cases a significant change of purpose or place of use to a water right. One of the few Texas cases on the subject, *Clark v. Briscoe,* 200 S.W.2d 674 (Tex. Civ. App.–Austin 1947, no writ), holds that the State can determine whether a water right amendment is detrimental to the public welfare without taking the water right holder's property. ***See* Attachment 7.**

Impact of Removing Junior Priority Language for Interbasin Transfers

Without the junior priority language or some substitute, language that absolutely protects existing water rights in the originating basin (first prong of old § 11.085 as recognized by the Texas Supreme Court) would be eliminated in favor of a balancing test for all interests involved (SB 1's language without the junior priority language and essentially the second prong of the Supreme Court test). Little protection for existing water rights would be afforded by the general transfer law, called the "four-corners" doctrine, that exists after SB 1 removed most historical protections when a water right is amended for a new in-basin use.[2] Other water right holders who have relied on the continued existence of the status quo of the other water rights in the basin would be denied their right entitling them to protection from interbasin transfer amendments with the historical "no prejudice" protections. But even if all involved in the debate cannot agree on the law existing prior to SB 1, it would be extremely helpful--so that the consequences of removing the junior priority protection are not obfuscated behind misleading rhetoric--if the proponents of removing the junior priority protection would at least acknowledge the absolute fact that, in the great majority of transfers, without the junior priority language, junior in-basin rights would have less water during dry periods after the interbasin transfer. With this agreement, then at least the legislature and water right owners would know the true impact of removal.

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[2] This change to Water Code § 11.122, found in Subsection (b), may also have constitutional problems if applied to permits granted before SB 1, since the water rights in existence at the time of SB 1 should be entitled to the protection from amendments that impair their rights. *See Slaughter,* 382 S.W.2d 111 (rights acquired under prior irrigation act were vested rights that legislature could not constitutionally cut off); *San Carlos Apache Tribe,* 972 P.2d 179 (legislation may not disturb vested water rights by retroactively changing the law to lessen protectic given to junior water rights over senior water rights that may have been abandoned or terminated by of operation of prior law).

ATTACHMENT 1

Texas Department of Water Resources

INTEROFFICE MEMORANDUM

TO : The File

DATE: July 13, 1982

THRU :

OCT 20 1982

FROM : Gwen Webb, Attorney

SUBJECT: Mackenzie Municipal Water Authority, Application to Amend Permit No. 2297 to authorize transbasin diversions and use

Mackenzie Municipal Water Authority seeks to amend Permit No. 2297 to authorize the supply of municipal and industrial water to its member cities: Tulia in Swisher County and Silverton in Briscoe County, Red River Basin; and Lockney and Floydada in Floyd County, Brazos River Basin.

The processing of this application is specifically governed by Texas Water Code, Section 11.085, and Rules 156.02.15.013 and 156.04.20.001. Additionally, the Commission has indicated in recent proceedings that it will be considering the guidelines set out in Texas Water Code, Section 16.052.

Section 11.085(a) states that no interwatershed transfers may be authorized "to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted." The prohibition is broad and seems to protect the basin of origin in several ways: (1) Interwatershed transfers are subject not only to existing senior and superior water rights, but also future water rights for irrigation municipal and domestic and livestock use in the basin of origin, since these uses are directly related to the water demands of persons and property; and (2) Water use as well as water quality is protected. Section 11.085 also states that a hearing must be held "to determine the rights that might be affected by the transfer," and that diversion of water in violation of this statute is a misdemeanor, with each day of diversion constituting a separate offense.

Department Rule 156.02.15.013 requires trans-watershed transfers to state the watershed of origin and the watershed of delivery in the application. Department Rule 156.04.20.001 requires that the basin of origin and the basin of delivery be named, that notice be issued in accordance with Section 11.132 in the watershed of origin and that notice be given to users of record in the watershed of delivery. In this case, basin-wide notice must be mailed and published in the Red River Basin, as well as almost the entire Brazos River Basin. Affected counties or portions of counties ar

Red River Basin

Deaf Smith	Donley	Knox
Parmer	Hall	Wilbarger
Castro	Motley	Baylor
Potter	Dickens	Archer
Randall	Hemphill	Clay
Swisher	Wheeler	Montague
Hale	Collingsworth	Cooke
Carson	Childress	Grayson
Armstrong	Cottle	Fannin
Briscoe	King	Lamar
Floyd	Hardeman	Red River
Gray	Foard	Bowie

Brazos River Basin

Floyd	Archer	Johnson
Crosby	Young	Hill
Garza	Stephens	McLennan
Borden	Eastland	Falls
Dickens	Jack	Milam
Kent	Palo Pinto	Lee
Scurry	Erath	Limestone
King	Comanche	Robertson
Stonewall	Hamilton	Burleson
Fisher	Mills	Leon
Nolan	Lampasas	Madison
Knox	Burnet	Brazos
Haskell	Parker	Washington
Jones	Hood	Austin
Taylor	Somervell	Grimes
Baylor	Bosque	Waller
Throckmorton	Coryell	Fort Bend
Shackelford	Bell	Brazoria
Callahan	Williamson	

Section 11.085 indicates that transwatershed diversions have the potential for harming water rights in the basin of origin. The amendment, therefore, is in the nature of a 156.04.10.001-.002 amendment and should be given a new priority date.

Section 16.052 provides:

> The executive director shall not prepare or formulate a plan which contemplates or results in the removal of surface water from the river basin of origin if the water supply involved will be required for reasonably foreseeable water supply requirements within the river basin of origin during the next ensuing 50-year period, except on a temporary, interim basis.

The Commission has indicated that it is not willing to authorize permits or amendments for interwatershed transfers unless there is evidence that there is a surplus of water in the watershed of origin for at least 50 years. This determination will involve coordination with the Planning and Development staff. The 50-year guideline can be considered useful since, in connection with Section 11.085, it does establish a temporal frame of reference. The amendment is likely to be issued if the Department can show that the amendment will not prejudice the persons or property in the Red River Basin. In making its recommendation, the planning staff should be aware that the Commission is likely to hold the staff accountable for those assumptions in future permits. In view of the Commission's quest for consistency, the Department may want to make the standards broad and reasonably flexible.

AATA Climicit
5-13-82

ATTACHMENT 2

MacKenzie Municipal Water Authority

Water Right

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 02-5211 OWNER: MacKenzie Municipal Water Authority
Route 1, Box 14
Silverton, Texas 79257

COUNTIES: Swisher, Briscoe and Floyd PRIORITY DATES: June 26, 1967 and July 19, 1982

WATERCOURSE: Tule Creek, tributary of Prairie Dog Town Fork Red River, tributary or the Red River BASIN: Red River

WHEREAS, by final decree of the 251st Judicial District Court of Potter County, in Cause No. 67865-C, In Re: The Adjudication of Water Rights in the Upper Red River Segment of the Red River Basin dated January 29, 1987 a right was recognized under Permit 2297 authorizing the MacKenzie Municipal Water Authority to appropriate waters of the State of Texas as set forth below:

WHEREAS, by an amendment to Permit 2297, issued on September 8, 1982, the Texas Water Commission authorized the use of the impounded water for recreation purposes and a transbasin diversion and use of 50 percent of authorized amount of water to the Authority's service area in the Brazos River Basin;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Red River Basin is issued to the MacKenzie Municipal Water Authority, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and a 46,450 acre-foot capacity reservoir on Tule Creek and impound therein not exceed 13,935 acre-feet of water. The dam is located in the Beaty, Seale and Forwood Survey 55, Abstract 144, Briscoe County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 4000 acre-feet of water per annum for municipal purposes and 1200 acre-feet of water per annum for industrial purposes. Owner is authorized a transbasin diversion and use of not to exceed 50 percent of the authorized amounts for use in the Authority's service area in the Brazos River Basin.

B. Owner is also authorized to use the water impounded in the aforesaid reservoir for recreation purposes.

3. DIVERSION

A. Location:
At the perimeter of the aforesaid reservoir.

B. Maximum rate: 20.00 cfs (9,000 gpm).

4. PRIORITY.

A. The time priority of owner's right is June 26, 1967 for the impoundment of water and the diversion and use for municipal and industrial purposes.

B. The time priority of owner's right is July 19, 1982 for the transbasin diversion and use of the impounded water for recreation purposes.

5. SPECIAL CONDITIONS

A. Owner shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

B. Owner shall maintain the following:

(1) Continuous reservoir content and lake level measu station;

(2) Record of outflow from reservoir;

(3) Daily record of diversions from reservoir;

(4) Establish and monument an adequate number of sedimentation ranges prior to impoundment of water for future determination of reduction of water storage capacity by sediments; and

(5) Provide revised elevation-area-capacity data as determined from surveys of sedimentation ranges.

The locations of pertinent features related to this certificate are shown on Page 11 of the Upper Red River Segment Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 251st Judicial District Court of Potter County, Texas, in Cause No. 67865-C, In Re: The Adjudication of Water Rights in the Upper Red River Segment of the Red River Basin dated

January 29, 1987 and supersedes all rights of the owner asserted in tha cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Red River Basin.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Red River Compact.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Paul Hopkins

Paul Hopkins, Chairman

DATE ISSUED:

SEP 25 1987

ATTEST:

Karen A. Phillips

Karen A. Phillips, Chief Clerk

Franklin County Water District

Water Right

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 04-4560

OWNERS: Franklin County Water District
P. O. Box 559
Mount Vernon, Texas 75457

Texas Water Development Board
Attn: Water Availability Data & Studies
P. O. Box 13231
Capitol Station
Austin, Texas 78711

COUNTY: Franklin

PRIORITY DATES: January 31, 1966, July 20, 1970, October 6, 1980 and April 18, 1983

WATERCOURSE: Cypress Creek (Lake Cypress Springs)

BASIN: Cypress Creek

WHEREAS, by final decree of the 188th Judicial District Court of Gregg County, in Cause No. 86-257-A, In Re: The Adjudication of Water Rights in the Cypress Creek Basin dated June 9, 1986 a right was recognized under Permit 2231AB authorizing the Franklin County Water District and the Texas Water Development Board to appropriate waters of the State of Texas as set forth below;

WHEREAS, by an amendment to Permit 2231AB issued on July 27, 1983, the Texas Water Commission authorized an increase in the maximum diversion rate from 40.4 cfs (18,100 gpm) to 161.5 cfs (72,352 gpm);

WHEREAS, by an amendment to Permit 2231ABC issued on June 13, 1986, the Texas Water Commission authorized the conversion of 6138 acre-feet of water from industrial purposes to municipal purposes of which 5000 acre-feet is authorized for transbasin transfer into the Sabine River Basin and 2185 acre-feet into the Sulphur River Basin;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Cypress Creek Basin is issued to the Franklin County Water District and the Texas Water Development Board, subject to the following terms and conditions:

1. IMPOUNDMENT

Owners are authorized to maintain an existing dam and reservoir on Cypress Creek (Lake Cypress Springs) and impound therein not to exceed 72,800 acre-feet of water. The dam is located in the

Paticaspio Flores Survey, Abstract 172 and the William McNe Survey, Abstract 335, Franklin County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 9300 acre-feet of water per annum from the aforesaid reservoir for municipal purposes, of which 5000 acre-feet of water may be diverted into the Sabine River Basin and 2185 acre-feet into the Sulphur River Basin.

B. Owner is authorized to divert and use not to exceed 5940 acre-feet of water per annum from the aforesaid reservoir for industrial purposes.

C. Owner is authorized to divert and use not to exceed 60 acre-feet of water per annum from the aforesaid reservoir for irrigation purposes.

D. Owner is authorized to use the impounded water of the aforesaid reservoir for recreation purposes.

3. DIVERSION

A. Location:
At the perimeter of the aforesaid reservoir and through the outlet structure of the dam.

B. Maximum combined rate: 160.78 cfs (72,350 gpm).

4. PRIORITY

A. The time priority of owners' right is January 31, 1966 for the aforesaid reservoir, the transbasin diversion of 1000 acre-feet of water per annum for municipal purposes for the City of Mount Vernon at a diversion rate not to exceed 27.00 cfs (12,150 gpm).

B. The time priority of owners' right is July 20, 1970 for the diversion and use of 60 acre-feet of water per annum for irrigation purposes; 8300 acre-feet for municipal purposes, of which 4173 acre-feet is relating to transbasin diversion and and 5940 acre-feet for industrial purposes.

C. The time priority of owners' right is October 6, 1980 for the increase of the diversion rate from 27.0 cfs (12,100 gpm) to 40.4 cfs (18,100 gpm) and to transfer not to exceed 2012 acre-feet of water diverted for municipal use from the Cypress Creek Basin to the Sabine River Basin.

D. The time priority of owners' right is April 18, 1983 for the increase of the diversion rate from 40.4 cfs (18,100 gpm) to 161.5 cfs 72,352 gpm).

5. SPECIAL CONDITIONS

A. Owners shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

B. Owners are authorized to use the bed and banks of Cypress Creek, below the aforesaid dam, to convey and deliver water to be appropriated here under to downstream diversion points.

C. Owners shall maintain a continuous content measuring station.

D. Owners rights hereunder or subject to an agreement for reservoir operations on Cypress Creek between the Texas Water Development Board; the Titus County Fresh Water Supply District No. 1; the Franklin County Water District; the Northeast Texas Municipal Water District and the Lone Star Steel Company, dated January 1, 1973 and to subsequent amendments to that agreement or basin operation orders issued by the Commission.

The locations of pertinent features related to this certificate are shown on Page 1 of the Cypress Creek Basin Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Water Commission, Austin, Texas and the Franklin County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 188th Judicial District Court of Gregg County, Texas, in Cause No. 86-257-A, In Re: The Adjudication of Water Rights in the Cypress Creek Basin dated June 9, 1986 and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Cypress Creek Basin.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Red River Compact.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ Paul Hopkins
Paul Hopkins, Chairman

DATE ISSUED:

OCT 13 1985
ATTEST:

/s/ Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

Guadalupe-Blanco River Authority

Canyon Reservoir

Water Right

AMENDMENT TO
CERTIFICATE OF ADJUDICATION

CERTIFICATE NO. 18-2074C			TYPE: AMENDMENT
Name:	Guadalupe-Blanco River Authority	Address:	933 East Court Street Seguin, Texas 78155
Filed:	January 10, 1990	Granted:	January 31, 1990
Purposes:	Municipal, Irrigation and Recreation	County:	Comal
Watercourse:	Guadalupe River	Watershed:	Guadalupe River Basin

WHEREAS, Certificate of Adjudication No. 18-2074B, issued August 12, 1988, includes authorization in Paragraph 2.A.(1), for the Guadalupe-Blanco River Authority to divert and use from Canyon Reservoir not to exceed 35,125 acre-feet of water per annum for municipal purposes with a provision that the authority can use, as a part of the municipal water authorized, not to exceed 1500 acre-feet of water per annum for irrigation purposes and 1500 acre-feet of water per annum for recreational purposes; and

WHEREAS, SPECIAL CONDITION 5.C. of the amended certificate indicates that the above-referenced authorization to use municipal water for irrigation and recreational purposes is to expire and become null and void on December 31, 1989; and

WHEREAS, applicant has requested an amendment to Certificate No. 18-2074, as amended, to extend the term allowing use of municipal water for irrigation and recreational purposes until December 31, 2000; and

WHEREAS, the Texas Water Commission finds that jurisdiction over the application is established; and

WHEREAS, no person protested the granting of this application; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Water Commission in issuing this amendment.

NOW, THEREFORE, this amendment to Certificate No. 18-2074, as amended, is issued to Guadalupe-Blanco River Authority, subject to the following provisions:

In Special Condition 5.C. of Certificate No. 18-2074B, the expiration date is amended to read December 31, 2000.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate No. 18-2074, as amended, except as specifically amended herein.

This amendment is issued subject to all superior and senior water rights in the Guadalupe River Basin.

Certificate owner agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Water Commission and to the right of continuing supervision of State water resources exercised by the Commission.

TEXAS WATER COMMISSION

B. J. Wynne, III, Chairman

DATE ISSUED: February 26, 1990

ATTEST:

Brenda W. Foster, Chief Clerk

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 18-2074B

OWNER: Guadalupe-Blanco River Authority
933 E. Court St.
Seguin, Texas 78155

COUNTY: Comal

PRIORITY DATES: March 19, 1956; October 14, 1980; February 22, 1983 and November 15, 1985

WATERCOURSE: Guadalupe River

BASIN: Guadalupe River

WHEREAS, the Texas Water Commission, on October 26, 1981, issued Certificate of Adjudication No. 18-2074A to the Guadalupe-Blanco River Authority reflecting the Authority's rights under Permit 1886 as of December 6, 1973, as recognized by final judgment and decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979;

WHEREAS, by final decree of the 267th Judicial District Court of Victoria County, in Cause No. 84-2-32534C-3, In Re: The Exceptions of Guadalupe-Blanco River Authority and Central Power and Light Company to the Adjudication of Water Rights of the Lower Guadalupe River Segment, Guadalupe River Basin, and a portion of the Lavaca-Guadalupe Coastal Basin, dated September 8, 1986, further rights were recognized the Authority under Permit 1886ABC as of February 17, 1981, the date the record was closed on the claim submitted by the Authority in that adjudication;

WHEREAS, the Commission has issued the Authority amendments to Permit 1886ABC (Permits 1886D-F) after February 17, 1981;

NOW, THEREFORE, this Amendment to Certificate of Adjudication 18-2074A is issued to Guadalupe-Blanco River Authority to reflect the Authority's rights under Permit 1886ABCDEF, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized the right to impound 740,900 acre-feet of water in an existing dam and reservoir on the Guadalupe River (Canyon Reservoir), which is owned by the United States of America and operated by the U.S. Corp of Engineers. The conservation storage capacity of Canyon Reservoir is 386,200 acre-feet of water. Point on the dam at the center of the stream bears N 04°15'E, 8241 feet from the east corner of the William Smith Survey, Abstract 542, Comal County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed an average of 50,000 acre-feet of water per annum from the water impounded in the conservation storage space in Canyon Reservoir in accordance with the following authorizations:

(1) Owner is authorized to divert and use not to exceed 35,125 acre-feet of water per annum for municipal use; provided, however, that owner is authorized to use from and out of such amount as additional purposes of use not to exceed 1,500 acre-feet of water per annum for irrigation use and 1,500 acre-feet of water for recreational use.

(2) Owner is authorized to divert and use not to exceed 100 acre-feet of water per annum for domestic use.

(3) Owner is authorized to divert and use for industrial use not to exceed:

(a) an average of 6,000 acre-feet of water per annum in connection with the generation of electrical power; provided, however, that 18,900 acre-feet may be so used during any year but not to exceed 30,000 acre-feet during any five consecutive calendar year period;

(b) an additional 6,075 acre-feet of water per annum; and

(c) an additional 2,700 acre-feet of water per annum.

B. Pursuant to the authorizations set forth in Paragraph 2A, above, owner is authorized to divert and use not to exceed 62,900 acre-feet of water in any year from Canyon Reservoir, provided that diversions may not exceed an average of 50,000 acre-feet per year over any five consecutive calendar year period.

C. Owner is authorized to transfer 7,649 acre-feet of water per annum for industrial purposes from the Guadalupe River Basin for use in that portion of the Lavaca-Guadalupe Coastal Basin which lies within the Authority's boundaries as such boundaries are defined by statute.

D. Owner is authorized to transfer 900 acre-feet of water per annum for municipal purposes from the Guadalupe River Basin for use in that portion of the San Antonio River Basin which lies within the Authority's boundaries as such boundaries are defined by statute.

3. DIVERSION

A. Location:

(1) On the perimeter of the aforesaid Canyon Reservoir.

(2) Releases through the dam for use downstream.

B. Maximum rate: Unspecified.

4. PRIORITIES

A. The time priority of owner's right to impound water in Canyon Reservoir and to divert and use water therefrom for all authorized purposes of use is March 19, 1956.

B. The time priorities of owner's right to transfer the 7,649 acre-feet of water per annum for industrial purposes from the Guadalupe River Basin for use in the Lavaca-Guadalupe Coastal Basin, as set forth in Paragraph 2C, above, are as follows:

(1) October 14, 1980, as to 6,075 acre-feet of water per year;

(2) February 22, 1983, as to 374 acre-feet of water per year; and

(3) November 15, 1985, as to 1,200 acre-feet of water per year.

C. The time priority of owner's right to transfer the 900 acre-feet of water per annum for municipal purposes from the Guadalupe River Basin for use in the San Antonio River Basin, as set forth in Paragraph 2D, above, is November 15, 1985.

5. SPECIAL CONDITIONS

A. Owner is authorized to use the bed and banks of the Guadalupe River to convey water released from Canyon Reservoir for all authorized purposes of use.

B. Owner shall maintain the existing outlet in the dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

C. The authorization to use the 1,500 acre-feet of water per annum for irrigation purposes and 1,500 acre-feet of water per annum for recreational use, as set forth in Paragraph 2A(1), above, shall expire and become null and void on December 31, 1989, after which date owner is authorized to use such 3,000 acre-feet of water per annum only for municipal use.

h The locations of pertinent features related to this certificate are shown on Page 1 of the Lower Guadalupe River Segment Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This amended certificate of adjudication is issued subject to all terms, conditions and provisions in the final judgment and decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CA-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, and in the final judgment and decree of the 267th Judicial District Court of Victoria County, Texas, in Cause No. 84-2-32534C-3, In Re: The Exceptions of Guadalupe-Blanco River Authority and Central Power and Light Company to the Adjudication of Water Rights of the Lower Guadalupe River Segment, Guadalupe River Basin, and a portion of the Lavaca-Guadalupe Coastal Basin, dated September 6, 1986, and supersedes all rights of the owner asserted in these causes.

This amended certificate of adjudication is issued subject to senior and superior water rights in the Guadalupe River Basin.

This amended certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ B.J. Wynne, III
B. J. Wynne, III, Chairman

DATE ISSUED:

AUG 12 1988
ATTEST:

/s/ Karen A. Phillips
Karen Phillips, Chief Clerk

MODIFIED
CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 18-2074A OWNER: Guadalupe-Blanco River Authority
P. O. Box 271
Seguin, TX 78155

COUNTY: Comal PRIORITY DATE: March 19, 1956

WATERCOURSE: Guadalupe River BASIN: Guadalupe River

WHEREAS, by final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, a right was recognized under Permit 1886 authorizing Guadalupe-Blanco River Authority to appropriate waters of the State of Texas as set forth below;

WHEREAS, the adjudication hearing record on the Guadalupe-Blanco River Authority's claim under Permit 1886 was closed on December 6, 1973;

WHEREAS, Certificate of Adjudication No. 18-2074, issued by the Texas Water Commission on July 17, 1981, reflects the status of Permit No. 1886 as it has been amended subsequent to December 6, 1973;

WHEREAS, Certificate of Adjudication No. 18-2074 has been filed and recorded by the County Clerk of Comal County, Texas, in Vol. 2, Pages 39 and 40, of the Water Rights Records of Comal County;

WHEREAS, by motion filed with the Texas Water Commission on August 3, 1981, the Guadalupe-Blanco River Authority requested that Certificate of Adjudication No. 18-2074 be modified to eliminate any reference to any amendments to Permit No. 1886 granted by the Commission subsequent to December 6, 1973, the date the hearing record for Permit No. 1886 in the Upper Guadalupe River Segment adjudication was closed;

NOW, THEREFORE, Certificate of Adjudication No. 18-2074, recorded in Vol. 2, Pages 39 and 40, of the Water Rights Records of Comal County, is withdrawn and this Certificate of Adjudication No. 18-2074A replacing Certificate of Adjudication No. 18-2074 is issued to the Guadalupe-Blanco River Authority subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is recognized the right to maintain a dam and reservoir, Canyon Reservoir, on the Guadalupe River and impound therein not to exceed 740,900 acre-feet of water. The conservation storage capacity of the Canyon Reservoir is 386,200 acre-feet of water. Point on the dam at the center of the stream is N 4°15'E, 8241 feet from the east corner of the William Smith Survey, Abstract 542, Comal County, Texas.

2. USE

Owner is authorized to divert and use not to exceed 50,000 acre-feet of water per annum from the water impounded in the conservation storage space of the Canyon Reservoir on the Guadalupe River for municipal purposes.

3. DIVERSION

In accordance with the terms of Permit No. 1886.

4. PRIORITY

The time priority of owner's right is March 19, 1956.

5. SPECIAL CONDITIONS

A. Owner is authorized to use the bed and banks of the Guadalupe River to convey water released from the conservation storage of Canyon Reservoir to downstream diversion points on the Guadalupe River.

B. Owner shall maintain the existing outlet in the dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

The locations of pertinent features related to this certificate are shown on Page 12 of the Guadalupe River Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Department of Water Resources and the office of the County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, and supersedes all rights of the owner asserted in that cuase.

This certificate of adjudication reflects the status of Permit No. 1886 as of December 6, 1973, the date that the record on owner's claim in this matter was closed. Nothing herein shall adversely affect any further rights of owner under Permit No. 1886 acquired since that date pursuant to amendments to said permit or otherwise.

This certificate of adjudication is issued subject to senior and superior water rights in the Guadalupe River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Department of Water Resources and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Felix McDonald, Chairman

DATE ISSUED:

October 26, 1981

Lee B. M. Biggart, Commissioner

ATTEST:

Dorsey B. Hardeman, Commissioner

Mary Ann Hefner, Chief Clerk

7-17-81

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 18-2074

OWNER: Guadalupe-Blanco River Authority
P. O. Box 271
Seguin, TX 78155

COUNTY: Comal

PRIORITY DATES: March 19, 1956 and October 14, 1980

WATERCOURSE: Guadalupe River

BASIN: Guadalupe River

WHEREAS, by final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, a right was recognized under Permit 1886 authorizing Guadalupe-Blanco River Authority to appropriate waters of the State of Texas as set forth below;

WHEREAS, by amendment dated May 13, 1977, issued to Guadalupe-Blanco River Authority to amend Permit No. 1886, use of 50,000 acre-feet of water per annum for municipal use was changed to use of 44,000 acre-feet of water per annum for municipal use and 6000 acre-feet of water per annum for industrial use;

WHEREAS, by amendment dated November 12, 1979, issued to Guadalupe-Blanco River Authority, Permit 1886A was amended as follows;

Guadalupe-Blanco River Authority was authorized to divert and beneficially use not to exceed an average of 50,000 acre-feet of water per annum or so much thereof as may be necessary in accordance with the following authorizations:

(1) 43,716 acre-feet per annum for municipal use; provided, however, that owner is authorized to use from and out of such amount for additional purposes of use not to exceed 1500 acre-feet per annum for irrigation use and 500 acre-feet per annum for recreational use, with the authorization to divert and use water for irrigation and recreational purposes expiring on December 31, 1989.

(2) 100 acre-feet per annum for domestic use;

(3) An average of 6000 acre-feet of water per annum for electrical power generation purposes but not to exceed 30,000 acre-feet of water during any 5 consecutive calendar years, and further, not to exceed 18,900 acre-feet during any one year;

(4) 184 acre-feet of water per annum for other industrial use;

WHEREAS, by amendment dated January 26, 1981, issued to Guadalupe-Blanco River Authority, Permit 1886B was amended as follows;

Guadalupe-Blanco River Authority was authorized to appropriate, divert and beneficially use not to exceed an average of 50,000 acre-feet of water per annum or so much thereof as may be necessary in accordance with the following authorizations;

(1) 37,641 per annum for municipal use; provided, however, that owner is authorized to use from and out of such amount for additional purposes of use not to exceed 1500 acre-feet per annum for irrigation use and 500 acre-feet per annum for recreational use with the authorization to divert and use water for irrigation and recreational purposes expiring on December 31, 1989;

(2) 100 acre-feet per annum for domestic use;

(3) an average of 6000 acre-feet per annum in connection with the generation of electrical power; provided, however, that 18,900 acre-feet may be so used during any year but not to exceed 30,000 acre-feet during any five consecutive calendar year period;

(4) 6075 acre-feet per annum for industrial purposes, said water to be transferred from the Guadalupe River Basin to the portion of the Lavaca-Guadalupe Coastal Basin that lies within the boundaries of the Guadalupe-Blanco River Authority, with said interbasin transfer of water having a time priority of October 14, 1980;

(5) 184 acre-feet of water per annum for other industrial purposes within the Guadalupe River Basin.

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Guadalupe River Basin is issued to Guadalupe-Blanco River Authority, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain a dam and reservoir on the Guadalupe River and impound therein not to exceed 740,900 acre-feet of water. Point on the dam at the center of the stream is N 4°15'E, 8241 feet from the east corner of the William Smith Survey, Abstract 542, Comal County, Texas.

2. USE

Owner is authorized to divert and use not to exceed an average of 50,000 acre-feet of water per annum from Canyon Reservoir on the Guadalupe River for the following purposes:

municipal use	-	37,641 acre-feet per annum
irrigation	-	1,500 acre-feet per annum to be deducted from the municipal use authorization
recreation	-	500 acre-feet per annum to be deducted from the municipal use authorization
domestic	-	100 acre-feet per annum
industrial (a) electrical power generation	-	an average of 6000 acre-feet per annum provided that 18,900 acre-feet may be used in any one year but not to exceed 30,000 acre-feet during any five consecutive calendar year period
(b) other use in the Lavaca-Guadalupe Coastal Basin	-	6075 acre-feet per annum
(c) other use in the Guadalupe River Basin	-	184 acre-feet per annum.

3. DIVERSION

By releases into the Guadalupe River from Canyon Reservoir.

4. PRIORITY

The time priority of owner's right is March 19, 1956 as to the right to appropriate, divert and beneficially use an average of 50,000 acre-feet of water per annum, and October 14, 1980 as to the interbasin transfer of water from the Guadalupe River Basin to the Lavaca-Guadalupe Coastal Basin.

5. SPECIAL CONDITIONS

A. Owner is authorized to use the bed and banks of the Guadalupe River to convey water released from conservation storage of Canyon Reservoir for all authorized purposes of use.

B. The authorization to use 1500 acre-feet of water per annum for irrigation and 500 acre-feet of water per annum for recreation shall expire on December 31, 1989, at which time owner will be authorized to use such 2000 acre-feet of water per annum for municipal use only.

C. Owner shall maintain suitable outlets in the dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

D. Owner is authorized to transfer 6075 acre-feet of water per annum for industrial use supplied under Permit No. 1886, as amended, from the Guadalupe River Basin for use in that portion of the Lavaca-Guadalupe Coastal Basin which lies within the boundaries of owner as such boundaries are defined by statute.

The locations of pertinent features related to this certificate are shown on Page 12 of the Guadalupe River Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Department of Water Resources and the office of the County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Guadalupe River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Department of Water Resources and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ Felix McDonald
Felix McDonald, Chairman

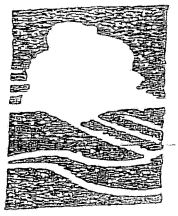
DATE ISSUED:

JUL 17 1981

ATTEST:

/s/ Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

ATTACHMENT 3



A Regulatory Guidance Document for Applications to Divert, Store or Use State Water

(DRAFT)

Texas Natural Resource Conservation Commission
Office of Water Resource Management
March 28, 1994

TABLE 2

TEXAS WATER CODE CHAPTER 11: GRANTING A WATER RIGHT

Section 11.134 of the Water Code provides that the Commission may grant an application for a new or additional appropriation of water only if:

1. *the application meets all necessary requirements;*
2. *unappropriated water is available in the source of supply;*
3. *the water will be beneficially used;*
4. *the use will not impair an existing water right or vested riparian right;*
5. *the use will not be detrimental to the public welfare; and*
6. *the applicant provides evidence that reasonable diligence will be used to avoid waste and achieve water conservation.*

In its consideration of an application for a new or amended water right, the Commission shall also assess the effects, if any, of the issuance of the permit or amendment on:

1. *bays and estuaries (Id. §11.147(b));*
2. *existing instream uses (Id. §11.147(d));*
3. *water quality (Id. §§11.147(d) and 11.150); and*
4. *fish and wildlife habitats (Id. §§11.147(e) and 11.152).*

In addition to the applicable criteria and factors discussed above, the Commission conside certain third party impacts with respect to an application for the interbasin transfer of wate Specifically, the application will not be approved if it would result in the "prejudice of any person property" situated in the basin of origin. Id. §11.085(a). Thus, an interbasin transfer may be allow if existing rights are protected, which is generally done by making the permit subordinate to affect existing rights. Halsell v. Texas Water Commission, 380 S.W. 2d 1 (Tex. Civ. App. - Austin 196 writ ref'd n.r.e.).

Water used in "excess" of what is reasonable is considered a "waste" of water. §297.54. However, normal operating losses of water associated with the storage, dist. treatment, delivery and application of water do not constitute "waste". What is "norm is site-specific to both the climate and engineering infrastructure of a region and water pr The efficient management of water prevents the waste of water. It is the obligation of all right holders to beneficially use water without waste.

A water conservation plan provides evidence that the water will be efficiently mar and not wasted. It also may be used, in place of or in conjunction with, water manage plans, water demand forecasts, and other data, to substantiate the amount of water whi necessary and reasonable for the requested use.

Comment → The uses listed in §11.023 are in a different order than preferences stated Inherent conflict that should be addressed by the Legislature.

The authorized purposes are listed in ~~preferential~~ order (see Table 6), but d determine the priority of the water right. Such priority is determined by time, the dat application was accepted for filing for the water right. The preferential order contain §11.024 ~~§11.023(a)~~ is used only in those instances where there are competing applications for the water. Comment → The applicability of §11.024 will depend to what is Water Management Plan is pending before a Hearing Examiner.

Water may also be appropriated and stored in an aquifer for subsequent recovery an in accordance with the authorized purpose. Such storage is allowable if it can be establi evidence or expert testimony that an unreasonable loss of water will not occur in the st water in the aquifer and that the water can be withdrawn at a later time for a benefi 11.023(e) pursuant to ~~§11.123(e)~~ of the Water Code. For purposes of recharge of the southern po the Edwards Aquifer underlying Kinney, Uvalde, Median, Bexar, Comal, and Hays cou only unappropriated storm and flood water may be used.

Finally, water used for instream uses is also recognized as a beneficial use. 30 §297.1. Instream uses include navigation, recreation, hydropower, fisheries, game prese stock raising, park purposes, aesthetics, water quality protection, aquatic and wildlife ha freshwater inflows to bays and estuaries, and any other instream use recognized by law.

C. Non-Impairment of Existing Water Rights (The "No Injury" Rule)

Statutory Authority

Section 11.134(b)(3)(B) of the Water Code provides that an application may approved if it would "impair" an existing water right or vested riparian right. With resp an application to amend a permit, including, but not limited to, changes in the place

purpose of use, time of use, point of diversion, or rate of diversion, TNRCC must ensure that the change does not impair uses by other water rights holders. This is commonly referred to as the "no injury" rule. Hutchins, The Texas Law of Water Rights (1961) pp 288-291; Skillern, Texas Water Law: Volume I, Ch. 3, pp 79-83 (1991).

Technical Review Criteria and Procedures

In order to prevent such harm to other appropriators, the Commission places restrictions on the amended water right. Tex. Water Code §§11.122 and 11.1351. This may occur if the applicant wishes to change his appropriation to a more consumptive use, move the existing diversion point, or otherwise impose additional legal obligations on other water right holders vis a vis the amended right. Restrictions could typically include the subordination of the amended right to affected water rights through limitations on the time or stream conditions when the amended right may be exercised. Such subordination, however, does not otherwise affect the original priority date of the water right being amended.

The purpose of the rule is to protect vested water rights by restricting changes in water rights to prevent conflict between diverters. An appropriator who invests in a diversion project on the basis of the stream conditions and water rights as they existed when his water right was granted is entitled to the protection of his vested right. Thus, even a junior appropriator can object to a senior appropriator's proposed change to the latter's water right.

Table 6

Beneficial Use of State Water

Authorized purposes of use of State water are identified in §11.023(a) of the Water Code as follows:

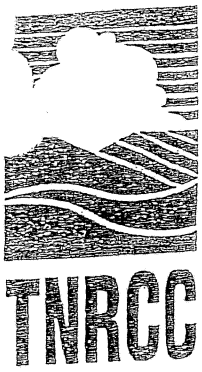
(1) domestic and municipal uses;
(2) industrial uses;
(3) irrigation;
(4) mining and recovery of minerals
(5) hydroelectric power;
(6) navigation;
(7) recreation and pleasure;
(8) stock raising;
(9) public parks;
(10) game preserves; and
(11) any other beneficial use.

The amount of water appropriated for each authorized purpose must be specifically appropriated for that purpose. Tex. Water Code §11.023(e).

D. Public Welfare

Statutory Authority

ATTACHMENT 4



June 1995
RG-141

A Regulatory Guidance Document for Applications To Divert, Store or Use State Water

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

conditions. Floodwater surface-elevation profiles and design-flood delineations of the floodplai shall be considered with the project in place and with a comparable levee or landfill on the opposite side of the stream if such structures do not exist but are plausible.

If the proposed project is found to meet the general criteria, the Commission is informed by the staff of the findings for due consideration of the application. Once the permit is issued, the second step, which involves preparation, evaluation, and approval of the final construction plans and details, is initiated. Detailed construction drawings, geotechnical studies including stability analyses, structural analyses, and specifications are required at this stage. The detail and depth of the supporting documentation will depend on the size and hazard classification of the project. In some cases, an emergency action plan may also be required.

Construction may commence only after approval of the plans and specifications have been obtained by the permittee. Projects impounding more than 1,000 acre-feet of water at normal storage capacity also require written Commission approval prior to deliberate impoundment. As soon as the construction is completed, a certificate of completion from the owner's engineer and recorded as-built drawings must be submitted to close out the project approval process. Future inspections of the project may by scheduled by the Commission staff to monitor the condition, maintenance, operation, and continued safety of the project.

H. Area of Origin Protection (Interbasin Transfer)

Statutory Authority

In addition to the general provisions discussed above regarding Commission review and approval of an application for a new or amended water right, §11.085 of the Texas Water Code provides that any interbasin transfer shall not be "to the prejudice of any person or property" within the basin of origin. In a case in which it interpreted Section 11.085 of the Code, the Texas Supreme Court in City of San Antonio v. Texas Water Commission, 407 S.W.2d 752 Tex. 1966), held that water in excess of that needed for the protection of existing water rights could be transferred after balancing the future benefits and detriments of the two competing basins. If the recipient basin's benefits were greater than the basin of origin's detriments, sufficient prejudice is absent and the transfer is allowable. The state water plan developed by the TWDB delineates river basin boundaries for purposes of this provision. Id. §16.051(b).

Technical Review Criteria and Procedures

An interbasin diversion may cause concern among the general populace living in the river basin from which the water is exported because of its possible far reaching impacts. For instance, a decision to move water from a rural area in one river basin to a city in another basin may: force a decline in agricultural productivity and the farming community built on it in the basin of origin; facilitate more rapid growth in the importing area; prevent future development

of the exporting area; curtail recreational opportunities; make sewage treatment more difficult as diluting streamflows are diminished; deprive the exporting area of groundwater recharge; and cause ecological changes in both areas.

The introduction of consideration of the public interest into the transfer process extends protection to interests beyond the legal interests of water rights holders. However, the extent of that protection for social and economic purposes is uncertain, especially because many "benefits" in both the basins of origin and destination are not, and cannot be, readily quantified and, therefore, easily compared. In any event, the objective is to reach a decision that secures the greatest possible benefit from the public waters for the citizens of the State.

In order to perform the balancing test as provided by City of San Antonio v. Texas Water Commission, the TNRCC requires as a part of the application for a significant and longterm interbasin transfer of water the submission of a water management plan addressing the current supplies, water management, and needs of the proposed users in the basin of destination. The plan should be prepared with broad participation from affected persons and entities in both basins and demonstrate that the recieving basin has examined and/or implemented all reasonable efforts to locally deal with its water needs prior to interbasin transfer, such as implementation of viable water conservation and reuse efforts, efficient system operations, acquisition of existing local supplies, and other such activities. Much of this information may be provided as a part of the water conservation plan and the social, economic, and environmental impact statement submitted with the application in accordance with Commission rules contained in 30 TAC Chapter 288 and §261.21 et seq., respectively. The content and analytical steps for this plan must also conform to those provided under subpart H, Long-term Water Supply Options, below. Enforcement provisions (including termination of the interbasin permit) are designed to help assure performance of the recieving basin applicant.

In many instances, the interbasin transfer of water is not done with the conveyance of the water right itself, but under a water supply contract to sell the water for a limited term. Thus, the interbasin transfer authorization terminates with the term of the underlying contract. Such contracts may provide for "interruptable" supplies of water to the buyer in times of drought in the exporting basin. In order to balance the need of both the exporting and importing basins during a drought period, the contract may contain negotiated percentages of the amount of exported water subject to interruption during drought or other emergency shortages of water occurring simultaneously in both basins. If the drought worsens, the parties may also agree to share any further reductions in supply on a pro rata basis, related to the amount of water remaining in reservoir storage. Since domestic water supplies need to be based upon longterm, reliable sources of supply, such short-term supply contracts are not advisable for this purpose without adequate alternative water supplies.

Commission rules in 30 TAC §295.155 require mailed notice of interbasin transfers to water right claimants or appropriators of record and navigation districts in the basin of origin and to users of record located below the point of introduction in the receiving watershed.

However, application notice requirements in 30 TAC §295.155 do not provide for maile notification of any third parties which may be affected by the transfer.

Finally, it should be noted that a statute prohibiting the state water plan from recommending the interbasin transfer of water if such water will be required for the reasonably foreseeable water supply requirements within the basin of origin during the next ensuing 50-year period, except on a temporary, interim basis, was repealed in 1991 (former sec. 16.052 Tex. Water Code). However, the state constitutional amendment providing that state monies may not be used to finance a project "which contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonable foreseeable future water requirements for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis" remains in effect. Art. III, sec. 49-d, Tex. Const.

I. Long-Term Water Supply Options

Statutory Authority

Section 11.140 of the Water Code provides that a permit may be issued for storage solely for the purpose of optimum development of a reservoir site. The Commission may convert these permits to permits for beneficial use if application to have them converted is made to the Commission. The purpose of this provision is to recognize the limited number of favorable locations for reservoirs and provide that these sites be developed to the maximum benefit feasible.

Suppliers of water for municipal and domestic purposes such as cities, districts, and river authorities desire a high degree of certainty in their ability to meet estimated future water demands. The traditional solution to this problem was to build new reservoirs. However, there are potentially significant economic, social, and environmental costs associated with a major new reservoir. Full appropriation of water and the protection of environmental water needs do not foreclose economic growth or diversity; they simply require careful and orderly management and development of existing supplies as demands change. As a result, local water planners have had to consider first the development of cost-effective and environmentally sensitive strategies to meet future water needs.

This is not to say that the building of new reservoirs will never be acceptable or appropriate. However it is now being recognized that a variety of feasible alternatives to new structural water development projects exist. The integration and implementation of these alternatives first can often defer or avoid construction of some reservoirs. Where appropriate, these alternatives may potentially save ratepayers money and allow more time to make wise water management and planning decisions in the most economical and environmentally sensitive manner.

ATTACHMENT 5

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: Mark Jordan, Director Water Policy Division Date: September 23, 1997

Thru: 9/25 Don Neal, Director, Water Quantity Division
Kariann Sokulsky, Manager, Water Uses & Availability Section

From: Lann Bookout, Water Rights Permitting

Subject: Interbasin Transfer Information

Of the total number of interbasin transfers authorized in existing water rights, about 80, only a handful of the authorizations were granted as amendments to existing rights. In these amendments the Commission either authorized the interbasin transfer with the old priority date or the amendment does not specify or mention a priority in which case the old priority must apply. Exceptions to this are Mackenzie MWA and the City of Clyde rights which were given priority dates of the filing date of the applications to amend the rights.

At least four authorizations, recently granted, allow the transfer w/the same priority date as the original right.

1. Water Right No. 4797-A, Sulphur River MWD, interbasin transfer from the Sulphur River Basin to the Trinity River Basin [from Cooper Lake to Lake Lavon]. Original permit dates back to 1965. The right was amended in 1992 to add the authorization for the interbasin transfer. This 1992 amendment didn't specify a priority for the transbasin water, so the 1965 date is assumed.

2. Water Right No. 4590-A, North East Texas MWD, transfer from the Cypress River Basin to the Sabine River Basin [Lake O' the Pines, Brandy Branch Lake]. This 1995 amendment specified that the interbasin transfer water has a 1957 (the original) priority date.

3. Water Right No. 5271, San Jacinto River Authority, interbasin transfer from the Trinity River Basin water to the San Jacinto and the Trinity-San Jacinto Coastal Basins. This right was amended in 1995 to add the authorization for the transfer. This 1995 amendment gives the interbasin transfer a 1917 (the original) priority date.

4. Water Right No. 2095-A, LNRA and the TWDB, interbasin transfer from the Lavaca River Basin to the City of Corpus Christi. This 1996 amendment gives the interbasin transfer a 1972 (the Certificates original date) priority.

5. Water Right No. 2410, North Texas MWD, transfer from the Trinity River Basin to the Sabine River Basin [Lake Lavon, to Royse City & others]. Type of water: Treated. This right does not mention, in any of the several amendments, the interbasin transfer. City of Royse is in the Sabine River Basin.

6. Water Right No. 1660-B, City of Clyde, interbasin transfer from Brazos River Basin to Lake Clyde in the Colorado River Basin. This 1988 amendment (which was uncontested) specifically gives the interbasin transfer a 1985 priority (the original priority is 1965).

7. Certificate No. 5211 (originally Permit No. 2297), Mackenzie Municipal Water Authority, interbasin transfer from the Red River to the Brazos. The original permit was issued in 1967 to allow use of 4000 acre-feet of water for municipal use and 1200 acre-feet for industrial use from the Red River Basin. In 1982 the Authority applied for an amendment to its 1967 permit to transfer a portion of the water out of the Red River Basin and into the Brazos Basin. The application to amend was not protested; this is indicated in the 1982 amended permit. The 1982 amendment allowed the use of not to exceed 50% of permitted quantities of water to be used within the Mackenzie service area in the Brazos River Basin. The amendment for the interbasin transfer use was given a 1982 priority. The Authority was involved in the State's adjudication at this time; the amendment to the permit had to be added to the final determinations as an addendum; it was incorporated into Certificate 5211 which recognized that a portion of the water could be transferred to the Brazos transbasin authorization and that water, when used outside the basin, retains the 1982 priority.

8. Certificate No. 04-4560 (Franklin Co Water Dist), transfer of water from Lake Cypress Springs in the Cypress River Basin to the Sulphur and Sabine River Basins. The history of this Certificate was difficult to trace. The original right is based on Permit No. 2231 issued in 1966 and apparently included transbasin diversion for some water. In 1970 the permit was amended to increase the appropriative amounts of water and allow some of the newly appropriated water to be transferred out of basin. In 1980, the permit was again amended to allow more of the permitted water to be transferred out of basin (this 1980 amendment did not result in an increase in the total amount of water authorized). In 1986, the permit was recognized as Certificate No. 4560 and allowing for the diversion of up to 15,300 acre-feet of water of which a total of 7,185 could be transferred out of basin. Of the 7,185 acre-feet of water authorized for use out of the basin, 1000 acre-feet has a priority date of 1966 (the original permit), 4,173 acre-feet of water has a priority date of 1970, and 2,012 acre-feet has a priority date of 1980; however, this latter amount of water has a priority date of 1970 if it is used within the basin of origin. The priority date of 1970 is associated with the 1970 application seeking additional amounts of water, and the 1980 priority date is associated with the application seeking an increase in the diversion rate as well as authorization to increase the amount of water permitted in 1970 for use out of the basin. A subsequent amendment to the Certificate in 1990 did not specifically ask for transbasin diversion authorization. The amendment asked to change some purposes of use for industrial and irrigation water which did not appear to be associated with transbasin authorization.

In summary, seven amendments specifically seeking and granting interbasin transfer authorization were identified. Of these, four, those most recently granted, protected the priority date of the original right. Three others (City of Clyde, Mackenzie, and Franklin) were assigned a new priority date using the filing date of the application to amend; the amendments to Clyde and Mackenzie did

not involve additional appropriations of water but changed the conditions and terms of use for the original permitted water. The 1970 amendment to the Franklin permit did seek an additional appropriation of water as well as additional interbasin transfer authorization. The 1980 amendment for additional interbasin transfer authorization did not allow the priority date of the original 1970 water to be retained but used the filing date of the 1980 application. It may be relevant in determining agency policy on this issue that the four most recent transfers, which protected the original priority dates, occurred after adjudication, whereas the three amendments which did not protect the original priority dates occured prior to or during adjudication in the applicable river basins.

Staff also reviewed the file for the North Texas MWD right but could not identify any amendment to this right which authorized additional interbasin transfers.

cc: Kenneth L. Petersen, Jr., Deputy Director, Office of Water Resource Management
Margaret Hoffman, Senior Water Rights Attorney, Legal Services Division

F:\MEMO.IBT

ATTACHMENT 6

5734

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 05-4670

OWNER: Sabine River Authority of Texas
P. O. Box 579
Orange, Texas 77631-0579

COUNTIES: Hunt, Rains and Van Zandt

PRIORITY DATES: September 12, 1955; August 13, 1985 and May 21, 1986

WATERCOURSE: Sabine River

BASIN: Sabine River

WHEREAS, by final decree of the 188th Judicial District Court of Gregg County, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, a right was recognized under Permit 1792B authorizing the Sabine River Authority of Texas to appropriate waters of the State of Texas as set forth below:

WHEREAS, by an amendment to Permit 1792B, issued on September 29, 1986, the Texas Water Commission extended the time limitation until July 1, 1991 for the use of 3500 acre-feet of water per annum for industrial purposes;

WHEREAS, by an amendment to Permit 1792B, issued on May 28, 1987, the Texas Water Commission authorized the Sabine River Authority of Texas the right to: (1) increase the impoundment in Lake Tawakoni from 926,000 acre-feet of water to a maximum of 927,400 acre-feet of water; (2) increase to amount of water used for municipal purposes to 238,100 acre-feet of water; (3) to operate Lake Tawakoni and Lake Fork Reservoirs on a joint use basis; and (4) to transfer from the Sabine River Basin not to exceed 227,675 acre-feet of water per annum to the Trinity River Basin and not to exceed 8396 acre-feet of water per annum to the Sulphur River Basin;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Sabine River Basin is issued to Sabine River Authority of Texas, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and reservoir on the Sabine River (Lake Tawakoni) and impound therein not to exceed 927,440 acre-feet of water. The dam is located in the N. G. Crettenden Survey, Abstract 33; the A. H. Lanier Survey, Abstract 135; the J. Tollett Survey, Abstract 230 and the J. Anderson Survey, Abstract 5, Rains County and the J. Anderson Survey, Abstract 31; the T. W. Anderson Survey, Abstract 14; the J. H. Terry Survey, Abstract 851 and the W. Hatcher Survey, Abstract 377, Van Zandt County, Texas.

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2. USE

A. Owner is authorized to divert and use not to exceed 238,100 acre-feet of water per annum from the aforesaid reservoir for municipal purposes.

B. Owner is also authorized to divert and use not to exceed 3500 acre-feet of water per annum of the municipal authorization from the aforesaid reservoir for industrial purposes.

C. The Sabine River Authority of Texas and the City of Dallas are authorized to operate Lake Tawakoni and Lake Fork Reservoir on a joint use basis. As used herein, the term "Joint Use Basis" shall mean that method of operation of the two reservoirs by which either party may sell, deliver or withdraw from one reservoir water which has been authorized to be diverted from either reservoir regardless of whether such party has the physical means to transport water from one reservoir to the other, subject to the special conditions contained herein.

3. DIVERSION

A. Location:
At any point on the perimeter of the aforesaid reservoir.

B. Maximum combined rate: 600.00 cfs (270,000 gpm).

4. PRIORITY

A. The time priority of owner's right is September 12, 1955 for the impoundment of 926,000 acre-feet of water in Lake Tawakoni; the diversion and use of 230,750 acre-feet of water for municipal purposes and the transbasin diversion of 207,675 acre-feet of water.

B. The time priority of owner's right is August 13, 1985 for the impoundment of the remaining 1440 acre-feet of water and the diversion and use of the remaining 7350 acre-feet of water for municipal purposes.

C. The time priority of owner's right is May 21, 1986 for the transbasin diversion and use of an additional 28,396 acre-feet of water.

5. SPECIAL CONDITIONS

A. Owner shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

B. The authorization to use 3500 acre-feet of water per annum for industrial purposes shall expire on July 1, 1991, after which date the use of said water shall revert to municipal use.

C. The Sabine River Authority of Texas shall not withdraw from Lake Tawakoni more than: (1) 47,620 acre-feet of water per annum, plus (2) any water transported by the Authority from Lake Fork Reservoir to Lake Tawakoni by means of pipeline, canal or otherwise.

D. The City of Dallas shall not withdraw from Lake Tawakoni more than: (1) 190,480 acre-feet of water per annum, plus (2) any water transported by the City of Dallas from Lake Fork Reservoir to Lake Tawakoni by means of pipeline, canal or otherwise.

E. No customer of the Authority shall have the right or entitlement to any portion of the City of Dallas' water in Lake Tawakoni or Lake Fork Reservoir.

F. Owner is authorized to transfer from the Sabine River Basin not to exceed 227,675 acre-feet of water per annum to the Trinity River Basin and not to exceed 8396 acre-feet of water per annum to the Sulphur River for municipal purposes.

G. The authorization to operate Lake Tawakoni and Lake Fork Reservoir on a joint use basis does not authorize additional interbasin transfers of water.

The locations of pertinent features related to this certificate are shown on Page 2 of the Upper Sabine River Segment Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 188th Judicial District Court of Gregg County, Texas, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Sabine River Compact.

Certificate of Adjudication 05-4670

This certificate of adjudication is issued subject to senior and superior water rights in the Sabine River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Paul Hopkins

Paul Hopkins, Chairman

DATE ISSUED

MAY 2 1988

ATTEST:

Karen A. Phillips

Karen A. Phillips, Chief Clerk

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FILED FOR RECORD AT 9:00 O'CLOCK A M June 20, 1988 PEGGY P. HAMILTON
COUNTY CLERK, HUNT COUNTY, TEXAS - BY V. Shasp DEPUTY.

CERTIFICATE OF ADJUDICATION NO. 05-4

Date Recorded: 6-20-88

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of the Real Property records

Uvalde County, Texas

Jimmie D Hamilton
County Clerk
By N. Sharp, deputy

VOL 1122 PAGE 867

CERTIFICATE OF ADJUDICATION

063755

CERTIFICATE OF ADJUDICATION: 05-4669

OWNER: Sabine River Authority of Texas
P. O. Box 579
Orange, Texas 77631-0579

COUNTIES: Wood and Rains

PRIORITY DATES: June 26, 1974; February 28, 1983 and August 13, 1985

WATERCOURSE: Lake Fork Creek, tributary of the Sabine River

BASIN: Sabine River

WHEREAS, by final decree of the 188th Judicial District Court of Gregg County, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, a right was recognized under Permit 2948 authorizing the Sabine River Authority of Texas to appropriate waters of the State of Texas as set forth below:

WHEREAS, by an amendment to Permit 2948, issued on August 22, 1983, the Texas Water Commission authorized the Sabine River Authority of Texas to divert and use not to exceed: (1) 24,940 acre-feet of water per annum for municipal purposes within the Sabine River Basin; (2) the transbasin diversion of 120,000 acre-feet of water to the Trinity River Basin for use by the City of Dallas; (3) 20,000 acre-feet of water per annum for industrial purposes; and (4) a diversion rate of 334.4 cfs (150,000 gpm) for water sold to the City of Dallas pursuant to a contract;

WHEREAS, by an amendment to Permit 2948A, issued on May 28, 1987, the Texas Water Commission authorized a change in the diversion and use of water as follows: (1) 36,800 acre-feet of water per annum for municipal purposes within the Sabine River Basin; (2) the use of the bed and banks of Lake Fork Creek and Sabine River to transport water to downstream diversion points; (3) 19,500 acre-feet of water per annum for industrial purposes within the Sabine River Basin; (4) 131,860 acre-feet of water per annum for municipal purposes by the City of Dallas, of which 120,000 acre-feet may be used in the Trinity River Basin; (5) authorized the Authority and the City of Dallas to operate Lake Fork and Lake Tawakoni Reservoirs on a joint use basis; and (6) a diversion rate of 600 cfs (269,300 gpm);

WHEREAS, by an amendment to Permit 2948B, issued on November 2, 1987, the Texas Water Commission authorized a change in the amount of water to be diverted from Lake Fork Reservoir for municipal purposes within the Sabine River Basin from 36,800 acre-feet per annum to 37,300 acre-feet of water per annum;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Sabine River Basin is issued to Sabine River Authority of Texas, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and reservoir on Lake Fork Creek (Lake Fork Reservoir) and impound therein not to exceed 675,819 acre-feet of water. The dam is located in the J. Barfield Survey, Abstract 77; the F. S. Chaney Survey, Abstract 111; the J. J. Gholson Survey, Abstract 246; the G. W. Matthews Survey, Abstract 412 and J. M. Swisher Survey, Abstract 553, Wood County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 37,300 acre-feet of water per annum from the aforesaid reservoir for municipal purposes within the Sabine River Basin. This authorization is inclusive of the 20,000 acre-feet of water per annum which the Sabine River Authority agreed to provide to the City of Longview, Texas, in that "Water Supply Agreement" of March 5, 1975.

B. Owner is authorized to divert and use not to exceed 131,860 acre-feet of water per annum from the aforesaid reservoir for municipal purposes by the City of Dallas; however, not to exceed 120,000 acre-feet of water per annum may be transferred to the Trinity River Basin. This authorization is specifically made subject to the option of Texas Utilities Electric Company to purchase up to 17,000 acre-feet of water per annum for industrial purposes; said water to be purchased from the City of Dallas pursuant to that certain contract entitled "First Supplement to Water Supply Contract and Conveyance" dated July 30, 1986.

Upon the occurrence of the contingency set out above, the Sabine River Authority of Texas shall promptly notify the Executive Director in writing of such occurrence and shall promptly file the appropriate contract in accordance with special condition contained herein and the authorization for diversion and municipal use by the City of Dallas, set out above, shall be correspondingly reduced, while the appropriate purchaser (Texas Utilities Electric Company) is hereby granted the appropriate industrial authorization.

C. Owner is authorized to divert and use not to exceed 19,500 acre-feet of water per annum from the aforesaid reservoir for industrial purposes within the Sabine River Basin by Texas Utilities Electric Company. Furthermore, the Texas Utilities

Electric Company agrees to release and relinquish to the Sabine River Authority up to 7500 acre-feet of water per year for sale by the Authority for municipal use in the Sabine River Basin. Upon the occurrence of such release, the Authority shall promptly notify the Executive Director in writing of such release, and the above authorization for diversion and industrial use by the Texas Utilities Electric Company shall be correspondingly reduced and the Sabine River Authority shall be recognized the appropriate authorization for diversion and municipal use.

D. The Sabine River Authority of Texas and the City of Dallas are authorized to operate Lake Fork and Lake Tawakoni reservoirs on a joint use basis. As used herein, the term "Joint Use Basis" shall mean that method of operation of the two reservoirs by which either party may sell, deliver or withdraw from one reservoir water which has been authorized to be diverted from either reservoir regardless of whether such party has the physical means to transport water from one reservoir to the other, subject to special conditions contained herein.

3. DIVERSION

A. Location:
At any point on the perimeter of the aforesaid Lake Fork Reservoir.

B. Maximum rate: 600.00 cfs (270,000 gpm).

4. PRIORITY

A. The time priority of owner's right is June 26, 1974 for the impoundment of water in the aforesaid reservoir and the diversion and use of 164,940 acre-feet of water.

B. The time priority of owner's right is February 28, 1983 for the transbasin diversion of 120,000 acre-feet of water from the Sabine River Basin to the Trinity River Basin.

C. The time priority of owner's right is August 13, 1985 for the diversion and use of the remaining 23,720 acre-feet of water.

5. SPECIAL CONDITIONS

A. Owner will provide the facilities necessary to pass water through the dam at all times. To provide for downstream domestic, livestock, and natural streamline needs, owner will make sufficient releases from the reservoir in a manner approved by the Commission to maintain a minimum flow of 2.00

cfs at the USGS streamflow gaging station at State Highway 37, 5.0 miles downstream from the dam.

B. Owner will install and maintain a continuous lake-level measuring station and maintain the following records:

(1) Reservoir content;

(2) Discharges through Lake Fork Creek Dam.

All records will be compiled monthly and reported to the Commission annually and at other times as required.

C. Owner shall pass its proportional part of water required to maintain a minimum flow of the Sabine River at stateline in accordance with the Sabine River Compact.

D. Owner is authorized to transfer not to exceed 120,000 acre-feet of water per annum from Lake Fork Reservoir in the Sabine River Basin to the Trinity River Basin for municipal use by the City of Dallas. Water transferred to the Trinity River Basin under this authorization may be transported directly to the City of Dallas or may be transported to Lake Tawakoni in the Sabine River Basin and/or Lake Ray Hubbard in the Trinity River Basin for storage and subsequent use by the City of Dallas;

E. All of the contingent authorizations set out above are expressly conditioned on the Sabine River Authority notifying the Texas Water Commission in writing on the exercise of contractual options by the water purchaser and on the compliance by owner with the provisions of 31 TAC Section 297.101 - 297.108 of Texas Water Commission Rules. Such authorizations shall become null and void upon termination of the contract or contracts and, thereafter, owner shall be authorized to make such use of water hereunder as if such contingent authorizations had not occurred.

F. The Sabine River Authority of Texas shall not withdraw from Lake Fork Reservoir more than: (1) 56,800 acre-feet of water per annum, plus (2) any water transported to Lake Fork reservoir from Lake Tawakoni by means of pipeline, canal or otherwise.

G. The City of Dallas shall not withdraw from Lake Fork Reservoir more than: (1) 131,860 acre-feet of water per annum, plus (2) any water transported by the City of Dallas from Lake Tawakoni to Lake Fork Reservoir by means of piepline, canal or otherwise.

H. The authorization to operate Lake Tawakoni and Lake Fork Reservoirs on a joint use basis does not authorize additional interbasin transfers of water.

I. No customer of the Authority shall have the right or entitlement to any portion of the City of Dallas water in Lake Tawakoni or Lake Fork Reservoirs.

The locations of pertinent features related to this certificate are shown on Page 7 of the Upper Sabine River Segment Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 188th Judicial District Court of Gregg County, Texas, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Sabine River Compact.

This certificate of adjudication is issued subject to senior and superior water rights in the Sabine River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Paul Hopkins

Paul Hopkins, Chairman

DATE ISSUED:

MAY 2 1988

ATTEST:

Karen A. Phillips

Karen A. Phillips, Chief Clerk

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 03-4836

OWNER: City of Texarkana
Texarkana Water & Sewer Systems
P. O. Box 2008
Texarkana, Texas 75501

COUNTIES: Bowie and Cass

PRIORITY DATES: March 5, 1951; February 17, 1957; September 19, 1967 and May 18, 1981

WATERCOURSE: Sulphur River

BASIN: Sulphur River

WHEREAS, by final decree of the 202nd Judicial District Court of Bowie County, in Cause No. 86-C1702-202 In Re: The Adjudication of Water Rights in the Sulphur River Basin dated December 17, 1986 a right was recognized under Permit 1563C authorizing the City of Texarkana to appropriate waters of the State of Texas as set forth below;

WHEREAS, the United States of America, pursuant to the Flood Control Act of 24 July 1946 (Public Law 526, 79th Congress, 2nd Session), has constructed and operates and maintains the Wright Patman Dam and Reservoir on the Sulphur River in Cass and Bowie Counties;

WHEREAS, on the 16th day of September, 1968, the City of Texarkana entered into a contract (DACW-29-69-C-0019) with the United States of America for storage space of water in Wright Patman Reservoir;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Sulphur River Basin is issued to the City of Texarkana, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to impound water in a Reservoir (Wright Patman Reservoir) located on the Sulphur River which is owned by the United States of America and operated by the Corps of Engineers in accordance with the following impoundment schedule. The Dam is located in the Jesse M. C. Paxton Survey, Abstract 830 in Cass County; the A. H. Elliott Survey, Abstract 196; the W. D. Schocklie Survey, Abstract 528; the G. A. Sims Survey, Abstract 558; the T.& P. RR Company Survey, Abstract 595; the John T. Watson Survey, Abstract 649; the William White Survey, Abstract 679 and the Charles Caldwell Survey, Abstract 823 in Bowie County, Texas.

Month	Maximum Impoundment and Elevation
January	224.9 (265,300 acre-feet)
February	224.9 (265,300 acre-feet)
March	224.9 (265,300 acre-feet)
April	226.8 (325,300 acre-feet)
May	228.6 (385,800 acre-feet)
June	228.6 (386,900 acre-feet)
July	228.5 (380,800 acre-feet)
August	227.8 (355,700 acre-feet)
September	226.8 (324,900 acre-feet)
October	226.1 (302,000 acre-feet)
November	225.5 (282,600 acre-feet)
December	225.2 (273,600 acre-feet)

2. USE

A. Owner is authorized to divert and use not to exceed 45,000 acre-feet of water per annum from the aforesaid reservoir for municipal purposes.

B. Owner is also authorized to divert and use not to exceed 135,000 acre-feet of water per annum from the aforesaid reservoir for industrial purposes.

C. Owner is further authorized to transfer water lawfully diverted under the provisions of Paragraphs A and B above, from Wright Patman Reservoir in the Sulphur River Basin, the basin of origin, for use in the Cypress Creek Basin and in the Red River Basin in the following amounts and for the indicated purposes:

(1) Not to exceed 4500 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Cypress Creek Basin for municipal purposes.

(2) Not to exceed 4500 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Cypress Creek Basin for industrial purposes.

(3) Not to exceed 6500 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Red River Basin for municipal purposes.

(4) Not to exceed 5000 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Red River Basin for industrial purposes.

3. DIVERSION

A. Location:

(1) At a point on the perimeter of the aforesaid reservoir in the M.E.P.& P. RR Company Survey, Abstract 422, Bowie County, Texas.

(2) At a point on the perimeter of the aforesaid reservoir in the James Giles Survey, Abstract 404, Cass County, Texas.

(3) At a point on the perimeter of the aforesaid reservoir in the Jesse M. C. Paxton Survey, Abstract 830, Cass County, Texas.

B. Maximum combined rate: 320.00 cfs (144,000 gpm).

4. PRIORITY

A. The time priority of owner's right is March 5, 1951 for the diversion and use of the first 14,572 acre-feet of water for municipal purposes.

B. The time priority of owner's right is February 17, 1957 for the diversion and use of the next 10,428 acre-feet of water for municipal purposes and the first 35,000 acre-feet of water for industrial purposes.

C. The time priority of owner's right is September 19, 1967 for the diversion and use of the remaining 20,000 acre-feet of water for municipal purposes and 100,000 acre-feet of water for industrial purposes.

D. The time priority of owner's right is May 18, 1981 for the transbasin diversions of water.

5. SPECIAL CONDITIONS

A. Persons or entities who may acquire (other than as customers of the city's municipal water system) the right to use water authorized to be appropriated hereunder shall obtain permits from the Commission before commencing use of such water.

B. Owner shall maintain continuous reservoir content and lake level measuring station; record all discharges through the reservoir and maintain daily record of all diversions from said reservoir. All records shall be compiled monthly and reported to the Commission annually.

The locations of pertinent features related to this certificate are shown on Page 12 of the Sulphur River Basin Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 202nd Judicial District Court of Bowie County, Texas, in Cause No. 86-C1702-202 In Re: The Adjudication of Water Rights in the Sulphur River Basin dated December 17, 1986 and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Sulphur River Basin.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Red River Compact.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ Paul Hopkins
Paul Hopkins, Chairman

DATE ISSUED:

MAR 31 1987

ATTEST:

/s/ Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

ATTACHMENT 7

CLARK et al.
v.
BRISCOE IRR. CO.

No. 9588.

Court of Civil Appeals of Texas, Austin.

Feb. 19, 1947.

Rehearing Denied March 5, 1947.

Appeal from District Court, Travis County; J. Harris Gardner, Judge.

Action by Briscoe Irrigation Company against C. S. Clark and others for declaratory judgment or for alternative relief by mandamus and otherwise. From a judgment for plaintiff, defendants appeal.

Affirmed in part and reversed and rendered in part.

[1] STATUTES ⊂226
361k226
Texas statutes governing appropriation of public waters, adopted from statutes of Wyoming and Nebraska, must be given the same construction as had been given them by courts of those states before their adoption in Texas. Vernon's Ann.Civ.St. art. 7592; Laws Wyo.1895, c. 45; Laws Neb.1895, c. 69.

[2] WATERS AND WATER COURSES ⊂145
405k145
In Colorado and Wyoming, water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily, and use of the water may be changed from irrigation of one tract to irrigation of another if change does not injure other appropriators. Vernon's Ann.Civ.St. arts. 7559, 7592.

[2] WATERS AND WATER COURSES ⊂153
405k153
In Colorado and Wyoming, water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily, and use of the water may be changed from irrigation of one tract to irrigation of another if change does not injure other appropriators. Vernon's Ann.Civ.St. arts. 7559, 7592.

[3] WATERS AND WATER COURSES ⊂142
405k142
A water right, perfected under either the posting or the permit system, constitutes a vested interest in or title to use of the water, which is assignable except where attaching to specific land and carries with it the incidental right to change to any lawful place or purpose of use, subject only to regulations imposed by laws of the state granting appropriation. Vernon's Ann.Civ.St. arts. 7559, 7592.

[3] WATERS AND WATER COURSES ⊂153
405k153
A water right, perfected under either the posting or the permit system, constitutes a vested interest in or title to use of the water, which is assignable except where attaching to specific land and carries with it the incidental right to change to any lawful place or purpose of use, subject only to regulations imposed by laws of the state granting appropriation. Vernon's Ann.Civ.St. arts. 7559, 7592.

[4] WATERS AND WATER COURSES ⊂128
405k128
All Texas water appropriation laws, having been passed after adoption of constitutional amendment on conservation, must be construed in light of such amendment and of its objectives, express and implied. Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592; Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a.

[5] WATERS AND WATER COURSES ⊂128
405k128
The 1917 constitutional amendment on conservation evidences clear and explicit purpose to conserve public waters of the state and to develop their use in the public interest. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a.

[6] WATERS AND WATER COURSES ⊂133
405k133
The state board of water engineers has power and duty to determine, in exercise of sound and reasonable discretion, whether uses for which application for appropriation of waters is made, meet statutory objectives including that of being in the public interest. Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506- 7510, 7515, 7592.

[7] WATERS AND WATER COURSES ⊂133
405k133
The state board of water engineers has continuing duty of supervising distribution and use of public waters so as to attain constitutional and statutory objectives, and any substantial change in use or place of use, not authorized in original permit, must have their approval.

Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592; Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a.

[8] WATERS AND WATER COURSES ⚖145
405k145
The doctrine "inclusio unius est exclusio alterius" requires that statute dispensing with necessity for permit in event of changes in canal, ditch or other work not resulting in increased appropriation be construed as excluding possibility of changing place and purpose of use without permit. Vernon's Ann.Civ.St. art. 7495.

[9] WATERS AND WATER COURSES ⚖145
405k145
Power of state board of water engineers to determine public policy involved in change of use of water appropriated is not arbitrary but must be exercised with due regard to applicant's rights. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[10] CONSTITUTIONAL LAW ⚖62(5.1)
92k62(5.1)
Formerly 92k62(5), 92k62
In granting right to appropriate state-owned waters, legislature may prescribe conditions governing their use or change in use, and delegate to board of water engineers the authority and duty to see that such conditions are met. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[10] WATERS AND WATER COURSES ⚖145
405k145
In granting right to appropriate state-owned waters, legislature may prescribe conditions governing their use or change in use, and delegate to board of water engineers the authority and duty to see that such conditions are met. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[11] WATERS AND WATER COURSES ⚖145
405k145
The water statutes create no absolute right to change place or purpose of use of appropriated waters, but only vested right of change subject to control by legislature. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[12] WATERS AND WATER COURSES ⚖133
405k133
Statutory requirements governing exercise of rights under appropriation of waters in effect when application for appropriation was granted became ingredient elements of rights under such application. Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[13] CONSTITUTIONAL LAW ⚖80(2)
92k80(2)
Powers and duties of state board of water engineers with respect to permitting change in use of appropriated waters are not "judicial" as affecting validity of statutes conferring such powers and duties. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.
See publication Words and Phrases for other judicial constructions and definitions.

[13] WATERS AND WATER COURSES ⚖128
405k128
Powers and duties of state board of water engineers with respect to permitting change in use of appropriated waters are not "judicial" as affecting validity of statutes conferring such powers and duties. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.
See publication Words and Phrases for other judicial constructions and definitions.

[14] ADMINISTRATIVE LAW AND PROCEDURE ⚖235.1
15Ak235.1
Formerly 15Ak235
Fact finding is not an exclusive "judicial function" but an element essential to proper exercise of discretion in governmental officials or agencies, whether executive, legislative or administrative.
See publication Words and Phrases for other judicial constructions and definitions.

[14] CONSTITUTIONAL LAW ⚖52
92k52
Fact finding is not an exclusive "judicial function" but

an element essential to proper exercise of discretion in governmental officials or agencies, whether executive, legislative or administrative.
See publication Words and Phrases for other judicial constructions and definitions.

[14] CONSTITUTIONAL LAW ⊜79
92k79
Fact finding is not an exclusive "judicial function" but an element essential to proper exercise of discretion in governmental officials or agencies, whether executive, legislative or administrative.
See publication Words and Phrases for other judicial constructions and definitions.

[15] CONSTITUTIONAL LAW ⊜50
92k50
Whether a power or function conferred upon official or other governmental agency is judicial, "legislative", "executive" or "administrative" depends upon inherent nature or quality of the power or function, irrespective of whether it involves discretion.
See publication Words and Phrases for other judicial constructions and definitions.

[16] WATERS AND WATER COURSES ⊜145
405k145
In determining whether permitting change in use of appropriated waters would be detrimental to public welfare, state board of water engineers has power and duty to ascertain relevant facts and discretion to determine effect of such facts. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59; subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[17] ADMINISTRATIVE LAW AND PROCEDURE ⊜209
15Ak209
Generally, legislature may not delegate to a nonlegislative agency the duty to determine public policy, but must itself determine that policy and must prescribe definite standards and criteria for exercise of delegated duty of regulation in regard thereto.

[17] CONSTITUTIONAL LAW ⊜62(2)
92k62(2)
Formerly 92k62
Generally, legislature may not delegate to a nonlegislative agency the duty to determine public policy, but must itself determine that policy and must prescribe definite standards and criteria for exercise of delegated duty of regulation in regard thereto.

[18] CONSTITUTIONAL LAW ⊜62(5.1)
92k62(5.1)
Formerly 92k62(5), 92k62
Statutes empowering state board of water engineers to determine whether change in use of appropriated waters will be detrimental to public welfare are not invalid as delegating to the board the power to determine public policy on appropriation of waters. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[18] WATERS AND WATER COURSES ⊜128
405k128
Statutes empowering state board of water engineers to determine whether change in use of appropriated waters will be detrimental to public welfare are not invalid as delegating to the board the power to determine public policy on appropriation of waters. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

*676 Grover Sellers, Atty. Gen., and E. M. DeGuerin, W. P. Watts and Geo. W. Barcus, Asst. Attys. Gen., James V. Allred, Vinson, Elkins, Weems & Francis and Victor W. Bouldin, all of Houston, for appellants.

Morris Jamison, of Houston, and Powell, Wirtz, Rauhut & Gideon, and Ben H. Powell, Jr., all of Austin, for appellee.

McCLENDON, Chief Justice.

This appeal is from a declaratory judgment decreeing in effect that the owner of a permit granted by the Board (Board of Water Engineers of the State of Texas) in April 1940, authorizing the appropriator (permittee) to divert from a Texas stream a specified amount of water for the purpose of irrigating specifically described land (the right to which appropriation has ripened into a title), is not required to apply to the Board for authority to substitute other lands for those designated in the permit, or to change the purpose of use of the water from irrigation to other lawful uses; the right of such appropriator being free of any regulation or control by the Board, so long as the new use is a beneficial one authorized by law, and does not (1) result in an increased appropriation or taking a greater quantity of water than authorized in the permit; or (2) impair the vested rights of other appropriators.

The correctness of this holding controls the decision

of the case upon its merits.

Substantially, the facts are these:

April 6, 1940, the Board, upon his application and after due notice and hearing granted to R. T. Briscoe a permit to 'divert, appropriate and use' not exceeding 75,000 acre-feet per annum of the unappropriated waters of the Brazos River, in Fort Bend County, 'when beneficially used for the purpose of irrigation, mining, and municipal use.' Not exceeding 50,000 acre-feet per annum of this amount was for the purpose of irrigating not exceeding 25,000 acres of land per annum out of a tract of 87,155 acres described by metes and bounds and situated in Fort Bend, Brazoria and Galveston Counties; with the further limitation of not exceeding in any one year 'two acre-feet per acre for each acre actually irrigated within the 25,000 acres.' This permit was later acquired by Briscoe Irrigation Company, plaintiff below and appellee here. The 25,000 acre-feet for mining and municipal purposes is not here involved as it was not put to beneficial use, and so decreed by the trial court. The 50,000 acre-feet was put to the beneficial use of irrigating the lands authorized in the permit; and the right thereto became vested under art. 7592, R.C.A. August 13, 1945, appellee filed with the Board an application to amend the permit so as to substitute other specified lands for those designated in the permit and to change the purpose of use so as to include mining, manufacturing, and municipal. After proper notice and hearing the Board denied this application on December 13, 1945. This suit was filed by appellee on January 8, 1946, against the Board and others, in which it sought the following relief:

1. A declaratory judgment decreeing that it was not required to obtain an amendment of its permit from the Board as a prerequisite:

a. To change the place of use of its waters in the manner alleged.

b. To change the purpose of use of its waters to include mining, manufacturing and municipal.

*677 2. In the alternative, if it were held that an amendment of the permit was required, a declaratory judgment decreeing that the function of the Board was purely ministerial, with no discretion to deny the application; and that mandamus to compel approval of the amendment be awarded.

3. In the alternative, if the Board were held to have any discretion in the matter, a decree that the refusal o the Board was a gross abuse of its discretion, and th mandamus issue to compel approval of the application.

4. A decree (a) as between appellee and defendants other than the Board, and (b) as between appellee and the State that appellee has the right to extend its canal and supply its appropriated waters to irrigate the lands described in the application and for industrial and other lawful uses in or near Texas City or elsewhere in Galveston County.

5. A decree quieting appellee's vested title in its appropriated waters, and its right inherent therein to change the place and purpose of use thereof without interference from defendants, and that cloud upon its said title by reason of claims of defendants be removed.

During the course of the trial (to the court without a jury) all testimony offered by appellants in support of their contention that the Board had properly exercised whatever discretion it had in denying the application to amend the permit, was excluded upon objection of appellee's counsel upon the ground that the only issue in the case was whether appellee had the right to use the water for other beneficial purposes than those stated in the permit, and whether the Board had any discretion at all in such matters. This statement of appellee's counsel and ruling of the court eliminated from the case the alternative relief sought under paragraphs designated 2 and 3 above; and the court rendered judgment declaratory of appellee's rights as sought under paragraphs 1 and 4 above, and quieted the title of appellee as against other defendants than the Board as sought in paragraph 5 above.

No issue is raised questioning the perfection of appellee's title under art. 7592 to the use of 50,000 acre-feet of water authorized for irrigation purposes in the permit. Consequently, that portion of the decree quieting appellee's title thereto need not be considered.

Appellee's contention in support of the portion of the decree awarding the declaratory relief sought under paragraphs 1 and 4 above may be epitomized as follows:

[1] Texas statutes governing appropriation of public waters were adopted from those of Wyoming and Nebraska and must therefore be given the same construction as had been given them by the courts of those states prior to their adoption in Texas (See Board of Water Engineers v. McKnight, 111 Tex. 82, 229

S.W. 301, 304). Under such prior holdings in those states, where the appropriation of waters authorized in a permit had ripened into a vested title, the owner of the permit had the untrammeled and unrestricted right to change the place and character of use of such waters to any lawful place and use thereof other than those designated in the permit, without the necessity of sanction of a board or other governing authority, absent (as in our statutes) an express statutory requirement for an amendment of the permit in these regards with approval of such governing authority.

The legal doctrine embodied in the first sentence of this epitomization is one of such general acceptance as to require no elaboration here. Its application in the McKnight case was stated thus: 'The presumption is indulged that our Legislature was aware of the fixed judicial interpretation of the statutes in the states from which they were copied, and having been adopted, as thus construed, their validity is to be determined in the light of such construction.' If, therefore, our statutes, in the respects in question, were copied from those of other states, in which, at the time of their enactment here there was a 'fixed judicial interpretation' thereof in those states to the effect as contended by appellee and decreed by the court below, then it would follow that the decree in these regards is correct. Otherwise, our statutes must be construed by applying generally accepted rules of interpretation to the language employed and the objectives in view.

*678 In an elaborate brief which evidences able, exhaustive and painstaking research, and which is most interesting and instructive, appellee's counsel have presented a learned treatise upon the origin and development of water rights law in the several western states, as gleaned from custom, statutes, adjudicated cases, standard texts, and the works of eminent specialists upon the subject. This has been most helpful in resolving the issues and reaching the conclusions essential to a proper decision in the case. We do not deem it necessary to do more than briefly summarize this origin and development, and even that only in the respects and to the extent necessary to a clear statement of the essential conclusions we have reached.

We are dealing here only with appropriated waters, consequently riparian rights are not involved and need not be discussed.

The appropriation system of water rights law seems to have had its origin in customs of the miners in some of our western states in the decade preceding the Civil War. These customs were later crystallized into statutes which authorized appropriation by giving certain notice by posting, stating the place and purpose of use of the waters. Such appropriation, when followed by the prescribed use, gave the appropriator a vested right or title, as of the date of the notice, to use of the waters thus appropriated, which was superior to that of any subsequent appropriator. This right or title was perpetual, unless lost by abandonment, was assignable, and carried with it as an incident of title, the right to change the place and purpose of use at the pleasure of the appropriator, to any lawful place or purpose of use other than that designated in the original notice. This was the generally accepted view, as expressed in statutory enactments and judicial decisions under the notice system. This view is not questioned by appellants.

The first permit statute appears to have been passed by Wyoming in 1895, Laws 1895, c. 45, which was the prototype of those later passed in other states. It was followed in the same year by Nebraska. Laws 1895, c. 69. These are the states from which it is contended, and may be conceded for our present purposes, the original Texas permit statute of 1913, and the later 1917 more elaborate statute were in large measure, at least, copied. These statutes prescribed the purposes for which appropriation might be had, and delegated to a governing agency the function of passing upon the right to the permit. Their provisions need not be further detailed here. We have carefully examined all the authorities cited by appellee in support of the trial court's decree, and we do not find that any of them either involved or decided the specific question posed by the decree here involved. It is conceded that this question is one of first impression in this State. The cases which appear to be most strongly relied upon by appellee are: Farmers' & Merchants' Irrigation Co. v. Gothenburg Water Power & Irrigation Co., 1905, 73 Neb. 223, 102 N.W. 487; Johnston v. Little Horse Creek Irrigating Co., 1904, 13 Wyo. 208, 79 P. 22, 70 L.R.A. 341, 110 Am.St.Rep. 986; and State of Wyoming v. State of Colorado, 298 U.S. 573, 56 S.Ct. 912, 80 L.Ed. 1339.

The Nebraska case was one between two rival appropriators whose rights accrued under the notice system and prior to the permit statutes. We quote from the opinion [73 Neb. 223, 102 N.W. 488]: 'Under the law existing in 1894, the defendant had the right to extend its ditch and change the use of the water so as to use it all for irrigation purposes, instead of for power, if it so desired; and therefore the holding of the board of irrigation and the district court that it had a prior

right to the use of the whole 200 inches of water is correct. But since the irrigation (permit) law of 1895 has been enacted, under its provisions, by which the water must be attached to the land, it is incumbent upon the defendant clearly to specify in its application the identical lands upon which the water has been applied. The section of the statute allowing an extension of the ditch or a change of the place of use must be construed together with the provisions of the 1895 law, and while a prior appropriator may change the place of use of water which had already been appropriated, *679 it can only do so under the permission and subject to the administrative control of the board of irrigation.' (Emphasis added.)

The opinion was by a Supreme Court Commissioner. Its approval was given in a per curiam opinion of the Supreme Court, reading: 'For the reasons stated in the foregoing opinion, the decision of the district court as to priorities is approved, and the cause reversed and remanded, with directions to ascertain and set forth in the decree the specific lands to which the appropriation of the defendant attaches, and for such further proceedings as may be necessary to that end.'

Not only did the rights there involved accrue under prior posting laws, but the court held in the above quotation that the rights acquired under the prior laws were subject to and governed by the provisions of the 1895 permit law, under which, as construed by the court (and as subsequently enacted by statute) the water rights for irrigation purposes attached to the land designated in the appropriation authorization. It is not contended that this is now, or ever has been, the law of this State; except where governed by contract between appropriator and landowner (art. 7559).

The Wyoming case also was a contest between appropriators and involved an appropriation prior to statehood.

Appellee quotes the following from State of Wyoming v. State of Colorado, the author of the opinion being Mr. Justice Van Devanter, an acknowledged 'authority on land and water laws in the Western States' [298 U.S. 573, 56 S.Ct. 917]: 'In both Colorado and Wyoming water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators. The rules in this regard are but incidental to the doctrine of appropriation.'

[2] There is no question but that this is an accurate statement of the law both generally and as applied to the case there at bar. That was a contest between two sovereign states, representing both themselves and appropriators under their respective laws. No issue regarding the power or right of control of the individual state over appropriations acquired under its laws was involved.

[3] Nor is there any question but that a water right, when acquired and perfected either under the posting or permit system, constitutes a vested interest in or title to the use of the water thereby appropriated. Which interest or title is assignable (except where attaching to specific land) and carries with it the incident right to change the place or purpose of use to any lawful place or purpose of use other than that designated in the original appropriation, subject only to such regulations and restrictions as may be imposed by the laws of the state granting the appropriation. Since we do not find, as regards statutes of other states from which our permit appropriation laws were copied, any adjudication to the effect that, absent an express statutory requirement, the exercise of this right of change of place or purpose of use is absolute, and not subject to any regulation or control of the governing board, the question here must be determined by an examination of our statutes upon the subject.

Our permit laws were first enacted in 1913. In 1917 a more comprehensive statute was enacted. This latter was designed, among other things, to provide for the determination of existing water rights upon the several water courses in Texas, and for the preservation of a permanent record thereof. In this regard the statute was a copy of those previously adopted in Nebraska and Wyoming. In the McKnight case the validity of the statute in these respects was challenged and it was held invalid on the ground that it attempted to confer upon the Board (an administrative body) judicial powers in violation of Sec. 1 of art. II of our Constitution, Vernon's Ann.St., even though the right of judicial review of the Board's orders was given. It is interesting to note that, although these provisions of the Act were given the construction previously given them by the *680 courts of Nebraska and Wyoming, the decisions of those states upholding them were not followed. The 1917 Act was passed prior to the 1917 conservation amendment to the Constitution, art. XVI, Sec. 59a, and in the recent case of Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961, it was held that the McKnight decision was limited to statutes passed prior to that amendment, and that subsequent statutes conferring quasi-judicial powers upon administrative

boards in connection with our conservation laws, where judicial review was given, were not violative of Constitution art. II, Sec. 1.

All of our water appropriation laws were passed subsequently to the 1917 constitutional amendment. That is, they were either re-enacted by being carried forward into the 1925 codification, or were enacted subsequently thereto. Const. art. XVI, Sec. 59a, reads, in part, as follows: 'The conservation and development of all the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi- arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.'

[4] All of our water appropriation laws having been passed subsequently to the adoption of this amendment they must be construed in the light of it and of its objectives, both expressed and implied.

The following statutory provisions we regard as controlling of the question at issue. All emphasis is supplied.

Art. 7466 declares the public policy of the state in accordance with the 1917 amendment.

Art. 7467 declares that the ordinary flow and underflow, and the storm, flood and rain waters of every river or natural stream, etc., within this State, and the right to the use thereof 'are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter.'

Arts. 7470 and 7470a prescribe the following as the purposes for which water may be appropriated: irrigation, mining, milling, manufacturing, development of water power, construction and operation of waterworks for cities and towns, public parks, game preserves, recreation and pleasure resorts, power and water supply for industrial purposes and plants and domestic uses.

Art. 7471 provides: In the conservation and utilization of water declared to be the property of the State, the public welfare requires not only the recognition of uses beneficial to the public well-being, but requires as a constructive public policy, a declaration of priorities and appropriation thereof. These priorities so declared are: (1) Domestic and municipal uses; (2) uses to convert material from a lesser to a greater value; (3) irrigation; (4) mining; (5) hydro-electric power; (6) navigation; (7) recreation and pleasure.

Art. 7472c reads: 'Conservation of water resources for public welfare

'In the administration of laws provided for the maximum judicious employment of the State waters in the public interest, it shall be the duty of the State Board of Water Engineers, or other administrative agency designated for the service by the State, to conserve this natural resource in the greatest practicable measure for the public welfare; and recognizing the Statutory precedent established for granting the privilege to take and utilize the waters of the State for uses recognized and authorized, it shall be the duty of the State Board of Water Engineers or other agency of the State designated for the purpose to *681 observe the rule that as between applicants for rights to use the waters of the State, preference be given not only in the order of preferential uses declared, but that preference also be given those applications the purposes for which contemplate and will effectuate the maximum utilization of waters and are designated and calculated to prevent the escape of waters without contribution to a beneficial public service.'

Art. 7472d reads: 'Surveys to disclose measure and potential availability of water resources

'It shall be the purpose and policy of the State and of the enactments in accord therewith, in effecting the greatest beneficial utilization of waters of the State, to cause to be made all surveys essential to disclose the measure and potential availability of the water resources of the State to uses recognized; and to ascertain from necessary investigation the character of the principal requirements of the distinct regional division of the watershed areas of the State for the uses herein authorized, to the end that distribution of the right to take and use the waters of the State may be more equitably administered in the public interest, and

privileges granted for the uses recognized may be economically co-ordinated, achieving the maximum of public value from this resource; and recognizing alike the distinct regional necessities for water control and conservation, and for control of harmful floods.'

Art. 7492 requires that every person, etc., who desires to acquire the right to appropriate unappropriated waters 'shall before commencing the construction, enlargement or extension of any dam,' etc., 'in connection with the storage, taking or diversion of water, make an application in writing to the Board for a permit to make such appropriation, storage or diversion.'

Art. 7493 reads: 'Such application shall be in writing and sworn to; shall set forth the name and post-office address of the applicant; the source of water supply; the nature and purposes of the proposed use; the location and description of the proposed dam, lake, reservoir, headgate, intake, pumping plant, ditch, canal or other work; the time within which it is proposed to begin construction, and the time required for the application of the water to the proposed use; and, if such proposed use is for irrigation, a description of the lands proposed to be irrigated, and as near as may be, the total acreage thereof.'

Art. 7494 requires filing maps and other data in connection with the application.

Art. 7495 reads: 'Nothing in this Act shall be held or construed to require the filing of an application or procuring of any permit for the alteration, enlargement, extension or addition to any canal, ditch, or other work that does not contemplate, or will not result in, an increased appropriation, or the use of a larger volume of water, but before making any such alteration, enlargement, extension or addition, the person, association of persons, corporation or irrigation district desiring to make same, shall file with the Board of Water Engineers a detailed statement and plan for the information of the board, of the work proposed to be done.'

Art. 7506 makes it the duty of the Board to reject the application if (inter alia) it 'is detrimental to the public welfare.' The wording of this article was in some respects slightly changed by amendment in 1943, Acts 48th Leg., p. 455, ch. 303, § 1. The change is, if in fact any in substance, not important here. The quoted wording was not changed.

Art. 7507 reads: 'It shall be the duty of the Board to approve all applications and issue the permit asked for if such application is made in proper form in compliance with the provisions of this chapter and the regulations of said Board; and is accompanied by the fees required in this chapter; and if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this chapter, and does not impair existing water rights, or vested riparian rights and is not detrimental to the public welfare.'

Provisions for notice and hearing of the application are contained in arts. 7508-10, and the contents of the permit are prescribed in art. 7515 which include: 'the use or purpose for which the appropriation of water is to be made,' and if for irrigation '*682 a description and statement of the approximate area of the land to be irrigated; together with such other data and information as the Board may prescribe.'

Art. 7592 provides that where an appropriator 'shall have made use of the water, under the terms of such * * * permit for a period of three years * * * he shall be deemed to have acquired a title to such appropriation by limitation, as against any and all other claimants of water from the same stream, or other source of water supply, and as against any and all riparian owners upon said stream or other source of water supply.'

[5] The 1917 constitutional amendment, art. XVI, § 59a, evidences a clear and explicit purpose to conserve the public waters of the State and to develop their use in the public interest. To this end the express affirmative duty is enjoined upon the Legislature '[to] pass all such laws as may be appropriate thereto.' This general public policy was thereafter carried forward into our water laws, which set forth the purposes for which appropriation may be acquired, the order of priority in the different uses to which the waters may be applied, and provide for the determination by the Board,' not only of questions relating to whether the statutory requirements are met, but whether granting the application for permit will subserve the public interest. No right of appropriation may be acquired without application to the Board, setting forth the place and purpose of use, and a permit granted by the Board designating the place and purpose of use. The Board is charged with the duty of duly informing itself upon all matters relating to the proper performance of its duties in passing upon the application; is required to have a hearing after due notice to all interested parties; and is charged with the express duty to determine, inter alia, whether granting the permit will best subserve the public interest.

[6] There statutory provisions clearly invest the Board with the power and duty to determine whether the uses for which the application is made meet the statutory objectives, including that of being in the public interest. Necessarily the determination of that issue involves the exercise of a sound and reasonable discretion. Nor is it contended that the Board has not such discretion in passing upon an original application.

[7] Every consideration for vesting such original discretion in the Board applies with equal force for its exercise in case of change of purpose or place of use. We therefore think there is implicit in these provisions of our laws, constitutional and statutory, a vesting in the Board of the continuing duty of supervision over the distribution and use of the public waters of the State so as to see that the constitutional and statutory objectives are attained, and carrying with it the requirement that any substantial change in use or place of use not authorized in the original permit, must have the approval of the Board. Any other construction might easily result in defeat or circumvention of the objectives of the conservation laws.

[8] Art. 7495, quoted above, dispensing with necessity for a permit, is expressly limited to 'the alteration, enlargement, extension or addition to any canal, ditch or other work that does not contemplate, or will not result in, an increased appropriation,' etc. Place and purpose of use might have been embodied in the article as easily and simply as alteration in canals and other works. The fact that they were not so embodied, in itself constitutes a manifest legislative purpose to exclude them, and has the effect of strengthening the implication in the other statutes that application to the Board for authority to make changes of this character was required. The doctrine of inclusio unius est exclusio alterius would seem to require this construction.

We hold that authority of the Board is essential to authorize a change in use or place of use from that authorized in the permit.

[9] This holding is not inconsistent with a vested title in appellee to the use of the appropriated waters, nor with its right, as an incident to such title, to have the place and purpose of such use changed. The restriction upon such right of change extends only to the power and duty of the Board to determine the public policy involved *683 in such change. This power is not an arbitrary one but must be exercised with due regard to the rights of the applicant. Against the arbitrary abuse of such discretion, the applicant is not without remedy. Whether the Board properly exercised its delegated authority and discretion in the present instance is not brought in question in this appeal. Granted (as we hold) that the Board is vested with any authority and discretion in the matter, its order is presumptively valid; and no effort was made by appellee to show it otherwise.

[10][11][12] Appellee contends that the Board cannot be given the power to exercise control over the vested right of change of purpose or place of use of the water, because no right of judicial review of the Board's action is given, citing the above holding in Corzelius v. Harrell, modifying or at least limiting the holding in the McKnight case. It is true that no right of review is given of orders of the Board dealing with applications for appropriation except where the water is to be taken 'from any natural stream, water course, or watershed.' Art. 7590. Such appeal is to the district court 'of the county in which such diversion is proposed to be made.' In whatever respects the change in place of use was to a watershed other than that (or those) in which the lands described in the permit are located, the right of review is given. Independently, however, of the right of review, we see no consequent impediment to the power of the Legislature, in granting the right of appropriation of State owned waters, to prescribe conditions governing their use or change in use, and delegating to the Board the authority and duty to see that those conditions are met. The Board could not be invested with the power to destroy or impair vested rights. If, therefore, the right to change the place or purpose of use were an absolute one and not subject to regulation at the time of its vesting, it may be conceded that neither the Legislature nor the Board acting under its authority, could thereafter deny or impair that right. As we construe the statutes no such absolute right was created; but only the vested right of change, subject to such control thereof as the Legislature had prescribed. All of the statutes governing the exercise of the rights acquired under the appropriation were, as stated, in effect at the time the application was granted, and their requirements entered into and became ingredient elements of those rights, affecting their future exercise.

[13][14][15][16] Nor do we think the powers and duties conferred upon the Board in the respects in issue are in any proper sense judicial. Fact finding is not an exclusive judicial function. In respects in which discretion inheres or is vested in a governmental official or agency, fact finding is an element or ingredient essential to a proper exercise of such discretion, whether the function of such official or

agency be executive, legislative or administrative. An able discussion of this subject will be found in State v. Kelly, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156. Ratemaking is essentially a legislative function (Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150; Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Tex.Civ.App., 3 S.W.2d 489, affirmed Producer's Refining Co. v. Missouri-K. & T. R. Co. of Texas, Tex.Com.App., 13 S.W.2d 679), yet fact finding is one of its essential elements. Fact finding is essential to intelligent action in most, if not all, fields of appropriate remedial legislation; and is a fruitful source of legislative investigation through committees, commissions, etc. See Watts v. Mann, Tex.Civ.App., 187 S.W.2d 917 (error ref.). Whether a power or function, which is conferred upon an official or other governmental agency, is properly classified as judicial, legislative, executive, administrative or otherwise, depends upon the inherent nature or quality of the power or function, irrespective of whether it involves discretion, and, as an incident thereto, fact finding. In the case of Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 475, it was held that the duties conferred upon the Board 'to reject all applications and refuse to issue the permit asked for if there is no unappropriated water in the source of supply, or if the proposed use conflicts with existing water rights, or is detrimental to the public welfare,',' (*684 Emphasis added) were 'ministerial duties,' the remedy for refusal to perform which would be the same as in other like cases. Unless we read out of this provision as meaningless the determination of whether the proposed appropriation for the purposes and places of use set forth in the application is 'derimental to the public welfare,' then necessarily the Board is invested with the power and duty to ascertain the facts relevant to that issue and with the discretion to determine the effect thereon of such facts; and, by parity of reasoning, to resolve the factual issue as to whether a proposed change in the place or purpose of use would be 'detrimental to the public welfare' within the statutory meaning of that term.

[17][18] The further contention is made that the Legislature may not delegate to a non-legislative agency the duty 'to determine the public policy', but must itself determine that policy, and in delegating to an agency the duty of regulation in regard thereto must prescribe definite standards and criteria for the government of such agency, in the exercise of such delegated duty. This general proposition is correct. But we do not construe the language employed in these statutes as delegating to the Board the power to determine the public policy of the State in respect to the appropriation of its waters. That public policy is expressed in the related constitutional and statutory enactments. What is delegated to the Board is to determine from the factual situation presented in each particular case, whether granting the permit would be 'detrimental to the public welfare,' as declared in those enactments. The criteria are the reasonably appropriate measure of fitness, aptitude or relation the use or place of use applied for bears to the public policy or 'public welfare,' declared in the objectives of these enactments, the prescribed uses and priorities in uses, the conservation of the waters and their application and use in the greatest serviceable manner. The criteria are as definite as the subject in its varied applications will reasonably admit, and therefore clearly meet the constitutional test invoked. A case upon practical all fours in this respect is New York Central Securities Corp. v. U. S., 287 U.S. 12, 53 S.Ct. 45, 48, 77 L.Ed. 138. The opinion is by Chief Justice Hughes. The Congressional act there under consideration authorized the Interstate Commerce Commission to permit acquisition by one carrier of control of another, by certain means, whenever, in the opinion of the Commission, such acquisition 'will be in the public interest.' The opinion reads: 'Appellant insists that the delegation of authority of the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920 (41 Stat. 456), was designed better to assure adequacy in transportation service. * * * The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity.'

Closely analogous also are the delegation of power to the Railroad Commission to adjust 'correlative rights' in its gas proration orders, Art. 6008, Sec. 10(b), Vernon's Ann.Civ.St., and the exceptions in Rule 37 'to prevent confiscation,' and 'to prevent waste.' In Corzelius v. Harrell, *685 179 S.W.2d 419, 424, this court upheld the above article against this specific attack, holding: "To adjust correlative rights' affords as definite a criterion as that in the exception to Rule 37 'to prevent confiscation of property' (originally 'to protect vested rights'). That exception has been uniformly upheld, expressly against this particular attack. See Trapp v. Atlantic, [Refining Co.,] Tex.Civ.App., 169 S.W.2d 797, 800, error refused.'

This holding was expressly approved by the Supreme Court. 143 Tex. 509, 186 S.W.2d 961 at page 968.

Under our above holding other questions presented by appellants are immaterial.

In so far as the trial court's judgment vested title in appellee in the use of the appropriated waters as against defendants other than the Board, it is left undisturbed. In all other respects that judgment is reversed and judgment is here rendered for appellants.

Affirmed in part and in part reversed and rendered.

END OF DOCUMENT

Texas Water Code §11.085

This is the original statutory provision on interbasin transfers that was codified in §11.085:

"Interwatershed Transfers. (a) No person may take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, watercourse, or watershed in this state into any other natural stream, watercourse, or watershed to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted. (b) No person may transfer water from one watershed to another without fist applying for and receiving a permit form the commission to do so. Before issuing such a permit, the commission shall hold a hearing to determine the rights that might be affected by the transfer. The commission shall give notice and hold the hearing in the manner prescribed by its procedural rules. (c) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $100 nor more than $500 or by confinement in the county jail for not more than six months. (d) A person commits a separate offense each day he continues to take or divert water in violation of this section."

Below is the current version of §11.085. Since the SB1 changes in 1997, §11.085 has been amended three other times.
These amendments are shown in the text as follows:

- 2001 Amendments in **ORANGE**
- 2009 Amendments in **PURPLE**
- 2013 Amendments in RED

Explanations of the amendments are given in the footnotes.

Sec. 11.085. INTERBASIN TRANSFERS.

(a) No person may take or divert any state water from a river basin in this state and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a permit, certified filing, or certificate of adjudication from the commission authorizing the transfer.

(b) The application must include:

(1) the contract price of the water to be transferred;

(2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category; and

(3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users.

(c) The applicant shall provide the information described by Subsection (b) of this section to any person on request and without cost.

(d) Prior to taking action on an application for an interbasin transfer, the commission shall conduct at least one public meeting to receive comments in both the basin of origin of the water proposed for transfer and the basin receiving water from the proposed transfer. Notice shall be provided pursuant to Subsection (g) of this section. Any person may present relevant information and data at the meeting on the criteria which the commission is to consider related to the interbasin transfer.

(e) In addition to the public meetings required by Subsection (d), if the application is contested[1] in a manner requiring an evidentiary hearing under the rules of the commission, the commission shall give notice and hold an evidentiary hearing, in accordance with commission rules and applicable state law. An evidentiary hearing on an application to transfer water authorized under an existing water right is limited to considering issues related to the requirements of this section.

(f) Notice of an application for an interbasin transfer shall be mailed to the following:

(1) all holders of permits, certified filings, or certificates of adjudication located in whole or in part in the basin of origin;

(2) each county judge of a county located in whole or in part in the basin of origin;

(3) each mayor of a city with a population of 1,000 or more located in whole or in part in the basin of origin; and

(4) all groundwater conservation districts located in whole or in part in the basin of origin; and

(5) each state legislator in both basins.

(g) The applicant shall cause the notice of application for an interbasin transfer to be published in two different weeks within a 30-day period[2] in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin or the receiving basin. The published notice may not be smaller

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[1] The 2013 amendments deleted "of this section," which directly preceded "if the application is contested," and added the second sentence, "An evidentiary hearing on an application to transfer water authorized under an existing water right is limited to considering issues related to the requirements of this section." Acts 2013, 83rd Leg., ch. 1065 (HB 3233). This amendment also deleted subsec (b) subd. (4).

[2] The 2013 amendment substituted "in two different weeks within a 30-day period" for what was previously "once a week for two consecutive weeks." Acts 2013, 83rd Leg., ch. 1065 (HB 3233).

than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices.

(h) The notice of application must state how a person may obtain the information described by Subsection (b) of this section.

(i) The applicant shall pay the cost of notice required to be provided under this section. The commission by rule may establish procedures for payment of those costs.

(j) In addition to other requirements of this code relating to the review of and action on an application for a new water right or amended permit, certified filing, or certificate of adjudication, the commission shall:

(1) request review and comment on an application for an interbasin transfer from each county judge of a county located in whole or in part in the basin of origin. A county judge should make comment only after seeking advice from the county commissioners court; and

(2) give consideration to the comments of each county judge of a county located in whole or in part in the basin of origin prior to taking action on an application for an interbasin transfer.

(k) In addition to other requirements of this code relating to the review of and action on an application for a new water right or amended permit, certified filing, or certificate of adjudication, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed 50 years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries that must be assessed under Sections 11.147, 11.150, and 11.152 of this code in each basin. If the water sought to be transferred is currently authorized to be used under an existing permit, certified filing, or certificate of adjudication, such impacts shall only be considered in relation to that portion of the permit, certified filing, or certificate of adjudication proposed for

transfer and shall be based on historical uses of the permit, certified filing, or certificate of adjudication for which amendment is sought;

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing permit, certified filing, or certificate of adjudication, if an amendment to an existing water right is sought; and

(5) the information required to be submitted by the applicant.

(l) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:

(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period, **as** determined by the commission based on consideration of the factors described by Subsection (k)[3]; and

(2) the applicant for the interbasin transfer has prepared a drought contingency plan and has developed and implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

(m) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

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[3] Acts 2013, 83rd Leg., ch. 1065 (HB 3233) inserted "as determined by the commission based on consideration of the factors described by Subsection (k)."

(n) If the transfer of water is based on a contractual sale of water, the new water right or amended permit, certified filing, or certificate of adjudication authorizing the transfer shall contain a condition for a term or period not greater than the term of the contract, including any extension or renewal of the contract.[4]

(o) The parties to a contract for an interbasin transfer may include provisions for compensation and mitigation. If the party from the basin of origin is a government entity, each county judge of a county located in whole or in part in the basin of origin may provide input on the appropriate compensation and mitigation for the interbasin transfer.

(p) **A river basin**[5] may not be redesignated in order to allow a transfer or diversion of water otherwise in violation of this section.

(q) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000 or by confinement in the county jail for not more than six months.

(r) A person commits a separate offense each day he continues to take or divert water in violation of this section.

(s) Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing.

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[4] The 2013 amendments inserted "term of the" and substituted "including any extension or renewal of the contract" for what was previously "term." Acts 2013, 83rd Leg., ch. 1065 (HB 3233).

[5] The 2001 amendment substituted "a river basin" for what was previously "For the purposes of this section, a basin is designated as provided in accordance with Section 16.051 of this code. A basin." Acts 2001, 77th Leg., ch 966.

(t) Any proposed transfer of all or a portion of a water right under this section from a river basin in which two or more river authorities or water districts created under Section 59, Article XVI, Texas Constitution, have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water services areas shall be junior in priority to water rights granted before the time application for transfer is accepted for filing.

(u) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section.

(v) The provisions of this section, except Subsection (a), do not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same permit, certified filing, or certificate of adjudication;

(2) a request for an emergency transfer of water;

(3) a proposed transfer from a basin to its adjoining coastal basin;

(4) a proposed transfer from the part of the geographic area of a county or municipality, or the part of the retail service area of a retail public utility as defined by Section 13.002, that is within the basin of origin for use in that part of the geographic area of the county or municipality, or that contiguous part of the retail service area of the utility, not within the basin of origin; or[6]

(5) a proposed transfer of water that is:

[6] The amendments in 2013 rewrote subsec. (v) subd. (4). Prior to the changes, subsec. (v) subd. (4) read "a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in the part of the county or municipality and the municipality's retail service area not within the basin; or"

(A) imported from a source located wholly outside the boundaries of this state, except water that is imported from a source located in the United Mexican States;

(B) for use in this state; and

(C) transported by using the bed and banks of any flowing natural stream located in this state.[7]

[7] Subsection (v)(5) was added by the 2009 amendment. Acts 2009, 81st Leg., ch. 1016.

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Interbasin Transfer Information

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Last Legislative Session

Interbasin Transfers: Junior Water Rights Protections

This legislative session an important water right protection is at risk. This protection has been commonly referred to as the "junior rights provision" or "junior" that is found in the water code as section 11.085(s) and (t) and other parts of Tex. Water Code Ann.§ 11.085. Many people mistakenly point to Senate Bill l (Act of June 1, 1997 75th Leg,. R.S., Ch. 1010, 1997 Tex. Gen. Laws 3610) as the origin for the protection of basin-of-origin water rights against amendments that add the authorization for interbasin transfer. Senate Bill 1 only clarified the protection for basin-of-origin water right that has been part of Texas Water Law since 1913. The reality is that if House Bill 1153 by Representative Turner were to pass in its current form, for the first time in history, basin-of-origin water rights would have no protection from water right transfers.

The reality is that the junior rights provision only hinders interbasin transfers that would impair existing basin-of-origin water rights. **It** only comes into play in situations in which there is insufficient water for both the existing, basin-of-origin uses and the new out-of-basin use. When there is sufficient water for the new out-of-basin use, the junior rights provision has no effect.

Historically, proponents of eliminating the junior rights provision have suggested that unless the State can authorize transfers to solve out-of-basin shortages by creating in-basin shortages, it will not be able to address its water needs. For example, the last time a repeal of the Junior Rights Provision was proposed, proponents suggested that the 216 interbasin transfer

projects included in the 2002 Texas Water Plan will be blocked if the junior water rights provision is not repealed. What they omit is that 216 interbasin transfer projects were evaluated and determined feasible under existing Law. In other words, these interbasin transfer based projects are feasible with the junior priority protection for basin-of-origin water rights. These projects can be completed without repealing the junior water right provision. Finally, the fact that there have been no interbasin transfers authorized that impair water rights needed to meet basin-of-origin demands does not mean that the junior water rights provision has had a bad effect on Texas water resources development. The transfers it inhibits, are transfers that should be inhibited. The only water projects that are stymied by the junior water rights provision are projects that are bad for the basin-of-origin and, therefore, bad for the State of Texas. The State will not solve its water resource issues until it focuses on solutions that are not, in reality, a step forward in one basin, cancelled out by a step backwards in another basin.

Thus far, there have been five bills filed that make changes to Tex. Water Code Ann.§ 11.085: HB 1153 by Scott Turner, HB 2805 by James Frank, HB 3324 by Lyle Larson, and SB 1411 and SB 1588 by Craig Estes. HB 2805 exempts transfers between the Red River Basin and the Trinity River Basin. SB 1411 exempts transfers from one basin to an adjoining basin. SB 1588 removes the protection against interbasin transfers in the case of an interbasin transfer that is identified as a water management strategy or alternate water management strategy in the state water plan. HB 1153 repeals the statewide protection from interbasin transfers (11.085(s)) as well. As the interbasin transfer protection applicable protecting water rights in the Colorado River basin (11.085 (t)). HB 3324 has been set for hearing on April 8 at 2 p.m. or adjournment. This bill makes several changes to the IBT protections. It removes the possibility of mitigation

or compensation to the basin-of-origin. It proposes that an IBT be evaluated as to "the effect of the proposed transfer of water on promoting the highest efficiency and productivity of water use in this state". It also proposes to remove the requirement that the benefits to the recipient basin be greater than a detriment to the basin-of-origin. It also proposes to add two more classes of exemptions to Section (v) of Tex. Water Code Ann. § 11.0854. These are "(6) a proposed transfer of water resulting from recycled or desalinated water produced in the basin-of-origin; or (7) a proposed transfer of treated wastewater derived from water that was transferred to the basin-of-origin of the proposed transfer from the basin to which the effluent is returned."

GLOSSARY OF TERMS RELATED TO INTERBASIN TRANSFERS

1. **State Water:** Among other things, water flowing in a river, stream or lake.

2. **Water Right or Appropriation:** A right acquired under the laws of the State to use state water. A water right or appropriation is evidenced by a permit or certificate of adjudication. The terms of a water right include authority to use a certain quantity of water at a certain place for a particular purpose with a specific priority date.

3. **Run-of-the-River Right vs. Storage Right:** A storage right allows the impoundment of water in excess of current need for use later in times of low or no river flow. Storage may be "on-channel" of the river in which the right to use water is granted, or it may be "off- channel," at a point remote from the point that water is diverted from the river. By contrast, the dependability of a run-of-the-river water right is not based on the ability to store water for later use. Such rights are limited by the availability of flow at any given time.

4. **River Basin**: The drainage area that contributes stormwater runoff to a specific river, including any closed watersheds internal to the basin. The State has designated 15 major river basins and eight coastal basins for the purposes of determining when a proposed transfer is from one basin to another.

5. **Interbasin Transfer**: Sometimes called an interwatershed an interwatershed transfer or a transbasin diversion, an interbasin transfer consists of diverting or storing water from one river basin for use or discharge in a different river basin. The transfer can include a new appropriation or an amendment to an existing appropriation that changes the place of authorized use. In the debate on SB 143, it is important to remember that junior priority only concerns amendments to water rights, not new appropriations.

6. **Basin-of-Origin and Receiving Basin**: The basin-of-origin is the basin that loses water in a transfer. The receiving basin is the basin to which the water is transferred.

7. **Time Priority of a Water Right**: In Texas, water rights are given a priority to signify in what order the holder can take his turn to divert water in times of shortage. The first in time is the first in right, meaning that in time of water shortage, the oldest right will be satisfied first (up to the amount of its actual need for the purpose and place of use specified) before the next oldest right can divert. When the older right is downstream, the younger or junior right must let water pass by in order to satisfy the senior.

8. **Senior Right and Junior Right**: Senior and junior are relative terms. Every water right, except the one very oldest right on the stream, is junior to some other right. Also, a water right that is senior as to some rights may be junior as to others. In this sense, a "junior right" may have been in use for many decades. Another way of saying junior water right is to say "less senior" water right.

9. **Vested Property Right**: Water rights become "vested" through actual beneficial use of water for an authorized purpose. A water right that has vested is protected by the state and federal constitutions and cannot be taken away by the State without compensation. Both junior and senior water rights can be vested property rights. Even a vested water right can be modified by the State under certain conditions, including when a change in the place of use is requested by the water right holder; for example, a request for an interbasin transfer.

10. **Section 11.085**: Section 11.085 is the statute in the Water Code that provides additional restrictions on water rights seeking to transfer from one river basin to another. Since 1912, the interbasin transfer statute remained essentially unchanged up until last legislative session where more procedural requirements were added in order to receive permission to take water from one river basin to another.

11. **Junior Priority Provision**: The general junior priority provision is found in Subsection (s) of Water Code § 11.085, as amended by Senate Bill 1. It provides that "any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing." Section 11.085(t) provides similar protection in the Colorado River Basin because of particular reservoir operation agreements.

12. **House Bill 1153**: This bill seeks to remove the junior priority provision by repealing Subsections (s) and (t) of Water Code § 11.085. The junior priority provision is the only absolute protection in the Water Code for existing water rights against injury from interbasin transfers.

13. **House Bill 2805**: This bill would exempt the Red River Basin and Trinity River Basin from Subsections (s) and (t) of Water Code § 11.085 and thereby remove the junior priority provision on transfers between these two areas.

14. **House Bill 3324**: This bill makes several changes to interbasin transfer protections, including: removes mitigation or compensation to the basin-of-origin; replaces benefit to recipient basin vs. detriment to basin-of-origin test with an evaluation of 'highest efficiency and productivity'; and adds exemptions for transfers of water derived from recycled, desalinated, or treated wastewater sources.

15. **Senate Bill 1411**: This bill would add interbasin transfers between adjoining basins to the list of exemptions in Water Code § 11.085 (v).

16. **Senate Bill 1588**: This bill removes the protection against interbasin transfers that are identified as a water management strategy or alternative water management strategy in the state water plan.

BACKGROUND AND TALKING POINTS
REGARDING THE JUNIOR PRIORITY PROTECTION
IN INTERBASIN TRANSFERS

BACKGROUND

What Priority Means

Texas surface water rights are based on a first-in-time, first-in-right system of time priorities. Time priority is based on when an application for a water right is accepted for filing by the state. Every new water right is junior to water rights in existence at that time. Time priority is, in this sense, relative. A water right may be junior to some rights and senior to others.

In a drought, the senior most surface-water right is satisfied first, then the next most senior, then the next, until the end of the time line – the least senior, or, to put it another way, the most junior. If a river system is overappropriated, it runs out of water before the most junior rights are satisfied.

If water rights were physically lined up on a river by time priority, it would be easier. Of course, they are not. When the senior is upstream, there is no problem – he can simply divert what he needs and the junior gets what is left. When a senior is downstream of a junior, the junior may be required to let flow pass him by to satisfy the senior, even though the junior needs to store or divert water himself. Where there is a watermaster, the system is actively administered in a drought. Where there is no watermaster, the senior may have to seek TCEQ or court intervention in order to enjoy his priority.

History of the Junior Priority Protection in Interbasin Transfers

Texas surface water statutes since 1913 have included special protections when an appropriator proposed to move water from one river basin to another. Prior to Senate Bill 1, enacted in 1997, the Water Code said that water could not be moved to a different river basin if it would prejudice persons or property in the basin of origin. The Texas Supreme Court interpreted that statute in 1966[1] and it found that the statute required a two-part test:

- First, you protect all existing water rights from impairment.
- Then, *with the water that is left over,* you balance the needs of the basins.

The TCEQ applied the statute over time in permitting decisions. The TCEQ may permit new water rights for new interbasin use and it also may permit amendments of existing rights to accommodate new interbasin use. It appears from research of the TCEQ records that more often than not, when amending an existing right for new interbasin transfer, the water agency protected other existing water rights by giving the new out-of-basin use a new, junior time priority – moving it back to the end of the line because of the change in use.

Senate Bill 1, *as filed* in 1997, did two things that lessened the protection of existing rights that, in concert, were especially troublesome.

- First, Senate Bill 1 omitted the existing "no prejudice" language that required the two-part test (protection of existing rights *and* balancing) and replaced that no-prejudice language with *only* a balancing process.
- Secondly, Senate Bill 1 enacted a new no-injury test for amendments generally that would allow sales of historically unused and unperfected water rights at existing time priority.[2] This compounded the new danger to existing water rights from removing the no-prejudice language.

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[1] This case is *City of San Antonio v. Texas Water Commin,* 407 S.W.2d *752, 758* (Tex. 1966).

[2] We know of no other western prior-appropriation states that allow this result. Also, it is not enough to just put the old no-prejudice language back in now – the no-injury rule should also be rolled back if the junior priority protection is repealed or modified.

The House put protection of existing water rights back into Senate Bill 1 for interbasin transfers. It did so with the express junior-priority protection.

Under Senate Bill 1 as passed, an application to amend an existing water right for out-of-basin use automatically triggers a time-priority change that makes the new use junior to other rights to use water from the basin of origin that are in existence at the time the application for amendment is accepted for filing. That means that in a drought, when there is not enough water for everybody in the basin of origin, existing in-basin water rights are satisfied first, in order of *their* relative time priorities before the new out-of-basin use is satisfied; then the out-of-basin use gets water; and finally come other water rights that are approved later in time than the amendment for out-of-basin use. The out-of-basin use, in this sense, isn't always last, it stands in line as of the time of the amendment application.

TALKING POINTS REGARDING THE JUNIOR PRIORITY PROTECTION

There are arguments on both sides of the interbasin transfer issue and regarding whether Texas should continue to protect existing rights in the basin-of-origin in the manner most traditionally done – junior priority for the new out-of-basin use. On balance, we feel that the arguments for keeping the junior-priority protection, by far, are the most compelling at this time. We feel that rural Texas and agricultural interests are particularly put at risk by a repeal of the junior-priority protection.

It is argued in favor of repealing the junior-priority protection that water supply planners need a full range of supply tools in meeting water demands.

Although this statement is easy to agree with, water supply planners still *have* interbasin transfers as a planning tool even *with* the junior priority protection.

The junior-priority provision will not stop interbasin transfers of water. There are major new water supplies proposed in the Senate Bill 1 regional plans that involve interbasin transfers. Take the recommended Marvin Nichols Reservoir, for example. That reservoir is recommended for construction in the Sulphur River Basin to, in part, meet needs in the Trinity River Basin. The water right for Marvin Nichols would be junior in time priority to existing water rights in the Sulphur River Basin – not because it is interbasin or because of Senate Bill 1, but because it is a new water right – simply that, a new water right, junior in time priority.[3]

We also are beginning to hear a lot about innovative solutions for making interbasin transfers work under existing interbasin transfer laws, like the agreement between LCRA and San Antonio that also develops new water.

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[3] As an aside, it appears that the Marvin Nichols Reservoir is reflected in the TWDB's regional planning summary pie charts as a new interbasin transfer rather than new water, but it is both Such statistics in the TWDB summary should not be used to imply that we need to change lots of existing rights to interbasin use, because the numbers won't match the argument.

- *Sometimes it is argued that there were 80 interbasin transfers prior to Senate Bill 1 and none after Senate Bill 1; therefore, junior priority must be preventing transfers.*

The "80-interbasin-transfers" argument is not supported in agency records. The argument appears to have sprung from a 1997 TCEQ informational memo that identified 80 pre-Senate Bill 1 interbasin permitting decisions. That memo, itself, clearly states that of the 80 interbasin transfers approved prior to Senate Bill 1, *seventy-two* or so were new water rights – were like Marvin Nichols Reservoir. The junior priority protection has no impact on *new* interbasin water rights. The junior-priority protection in Senate Bill 1 has effect only when a new interbasin transfer is proposed by amendment to an existing water right.

Of the few interbasin *amendments* identified in the TCEQ memo, at least 4 *were* given junior priority. Of the 3 that kept their original priority, 2 were uncontested and 1 ended in a settlement.[4] And the TCEQ failed to include more than *5* additional interbasin transfer amendments, *all* of which included a new, junior priority.[5]

The 80-interbasin transfer argument actually favors keeping the junior-priority protection. The junior-priority concept has been in Texas law for many decades as a method of protecting existing water rights and it hasn't stopped water from moving.

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[4] The TCEQ memo identifies 8 interbasin amendments. Of those:

- 3 did keep the original priority date, but 2 of the 3 were uncontested (no other water right holder protested). The third *was* contested and the right was allowed to retain priority through a settlement.
- 1 amendment does not even mention that the new use is interbasin.
- 1 does not specify a priority date at all, and it appears from later sworn TCEQ Staff testimony that you would presume a priority date as of the application date – a junior priority.
- 3 amendments were expressly assigned a new, junior priority date.

[5] The 80-interbasin transfer memo and the rights the TCEQ missed are documented in the binder. The rights we know the TCEQ missed are: 1 North Texas Municipal Water District authorization to sell potable water in the Sabine River Basin, 2 amendments for the Sabine River Authority, 1 amendment for the City of Texarkana, and multiple interbasin transfer amendments to the Guadalupe-Blanco River Authority's Canyon Reservoir permit.

There may be lots of reasons for fewer interbasin transfers. The new balancing procedures appropriately require a lot of evidence. Permitting backlogs at the agency because of budget shortfalls and reassignments may be having an effect. It may be that some people have been waiting for the results of regional water supply planning and adoption of the state water plan. Maybe it's simply that we don't have as much water available. Maybe all the talk about repealing the junior priority provision is causing people to wait hoping for a cheaper deal.

The junior-priority protection does not prohibit transfers It does not prevent areas of the state in need of water from getting water. The junior-priority provision does require a would-be buyer to develop its transfer project in a manner that will not diminish the supply available to existing Water users in the basin of origin.

- *We cannot dispute that, in circumstances where there is a shortage of water in the basin of origin, junior priority makes interbasin transfers of existing rights more expensive to the purchaser.*

Where junior priority makes a water right undependable in a drought, building additional storage capacity to store water in times of plenty could produce a dependable yield. Also, a purchaser can simply buy enough rights to bring total rights in balance with available supply, or work mutually advantageous arrangements with all the rights that are potentially impacted.

Even where increased cost is a disincentive to an interbasin transfer, at least the cost falls on the new use. It does not fall on other existing rights on those who are not party to the transaction. There is a fairness in that. It is appropriate.

- *The argument that an interbasin transfer is between willing buyers and willing sellers misses an important point.*

Someone who has never used all of his water or who hasn't used some of his water in a long time probably is going to be very willing to offer a good deal to a water buyer. But, in an overappropriated basin, other users, junior to the seller, likely have been using that water. Their

use will be cut off by the interbasin transfer and will not be directly compensated.

- *We have heard it argued that junior priority reduces the value of individual water rights that otherwise would be attractive for purchase by out-of-basin interests.*

But, look at those individual rights. Surface water belongs to the state. When you apply for a right to use state water you swear that you will use the water only for stated purposes and only in a specific place, and you represent that you have an actual need for water for *that* use and in *that* place. Others got in line behind you to use water and they relied on the conditions to your water right and the law that would protect them if a change in your use was proposed.

When you come back wanting to sell your water for out-of-basin use, you are trying to *change* the deal you made with the state. You don't have an absolute right to do that. Water users have been on notice for decades about junior priority in interbasin transfer. At its best, junior priority keeps a water speculator from profiting by selling water out from under somebody else's use. If the junior-priority provision makes some interbasin transfers less valuable, then certainly repealing it will make many *other* water rights less valuable.

- *What about when water is currently being used in the basin of origin?*

Where water has been actually used, or even stored, the impact of that water use already has been felt in the system. From a water rights perspective, it makes some sense to let that perfected (stored or used) water go anywhere, including out of basin, at existing time priority.

However, this argument misses a very big issue – regional impacts. If significant perfected irrigation water goes out of a river basin, for example, irrigated agriculture could die in that region for others, and water may not be there for alternative beneficial uses in that area.

- *The argument that the basin of origin can protect itself through the balancing process has some merit. That's what the balancing process is all about, and balancing has been an important part of interbasin transfer protection for decades.*

We must question, however, whether a rural area ever will win a balancing test against the big cities. And mitigation to a basin does not mean that the *individuals* who go without needed water because of the transfer between a willing buyer and a willing seller will necessarily get any relief.[6]

Even allowing interbasin transfers within a regional planning area will not protect existing water rights. For example, there are projects being pursued today that, if carried out, will involve transfers within a water planning region, but between different river basins. Water planning regions are legislative constructs where planning decisions on projects can be favored by majority rule. There are instances where an interbasin transfer of water has been recommended in a regional plan against the wishes of the area from which the water is needed for in-basin use.[7] Individual rural and agricultural water users may be as much at risk of losing their water in an interbasin transfer that is internal to a region.[8] Even regional planning boundaries can be changed, and it would be a shame if pressure was brought to bear to manipulate those boundaries in the future to support a particular project. A compromise on the junior-priority protection for transfers within regions does not seem to be a workable solution even though it might be favorable for a couple of particular projects.

- *An argument that is dangerously appealing but misguided is that water would never be allowed to move out of a basin that does not have a surplus.*

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[6] The idea that the basin of origin can protect itself through *contracts* for sale has even less merit. There is no *entity* that is the basin of origin. The basin of origin can't enter into a contract that protects all of its parts.

[7] In the South Central Region (Region L), a transfer of water from the confluence of the Guadalupe/San Antonio River was recommended against the wishes of the area from which the water is to be transferred.

[8] In Region H, a transfer contingent on removal of the junior-priority protection is being sought to send water to Houston from the Trinity River, even though there are rice farmers needing water right now and, in fact, using the very water to be sold to Houston via the San Jacinto River Authority.

Some of the same people who say that water won't move unless there is a surplus, argue that water users won't invest in the pipelines and infrastructure necessary to bring water in from another basin if that water becomes junior and won't be there in a drought.

EXACTLY. THAT'S THE POINT. The water won't be there in a drought *because* there is not enough water in the basin of origin to dependably satisfy both other existing rights and the new transfer. If there *is* a surplus, junior priority doesn't matter – *all* water rights can be satisfied even in a drought. Repealing the junior-priority protection just means that in a drought, there won't be enough water in the basin of origin to satisfy *existing* uses for which investments already *have* been made.

- *There is a fear that the junior priority protection is putting more pressure on limited groundwater supplies.*

We haven't heard anyone come forward with specific examples. Some proposals, like ALCOA/San Antonio appear to have been on the table before Senate Bill 1. If there's pressure on groundwater supplies, at least it's not new pressure. The junior priority protection concept has been around for a long time.

Groundwater is the less regulated supply. Common sense and economic theory make it almost inevitable that water deals will go toward that supply. We also have to consider that surface-water rights and groundwater rights have very different origins. Surface water use begins with a grant from the state that it is limited when the right is granted. Groundwater use begins with a completely private right. We continue to work on our groundwater laws. Let's give those efforts a chance.

It's unfortunate that a wedge has been driven between surface water users and groundwater users. Their concerns and their issues are actually quite similar.

- *A lot of emphasis has been placed on water marketing as a solution to Texas water shortages. Repealing the junior-priority protection could encourage sales of water for interbasin use.*

On the other hand, we shouldn't want marketing for the sake of having a market. Marketing is a process, not a goal. The goal is beneficial use of water supplies in a fair system. Water going to the highest bidder in a free market may not be everybody's idea of a fair system. It's certainly not good for rural communities and irrigated agriculture.

When you consider that junior priority is an issue only when there's a shortage of water in the basin of origin, you realize that this *market* would be for moving water from one area that doesn't have enough water to another area that doesn't have enough water. Now users in the area of origin have to find new supplies and maybe there is even a second round of transactions for that. That's a heck of a market, but it's not a good vision for the state's overall water supply.

- *It must be acknowledged that there are some reasonable arguments on both sides of the interbasin transfer argument.*

On balance, the concept of protecting existing water rights that has been around for 80+ years must win out. It would be most unfortunate if the law to protect existing rights was abandoned rashly.

If the decades-old junior priority protection concept goes, and water moves, that water probably won't be coming back or won't be coming back to the basin of origin anytime soon. It will be gone to the new use. We can't just go back and fix things next session. If we allow a land-rush like grab for interbasin transfers, we won't be able to reverse it.

There may be reasons for wanting a quick repeal for one particular project or another. There are good-for-Texas reasons to move much more cautiously. We urge that the junior-priority protection NOT be repealed.

Transfers of Surface Water Rights

	Transfers Generally	Interbasin Transfers
Prior to Senate Bill 1	• Injury to existing water users considered actual historical use (at least when challenged). • Standard was implied from statutory permitting provisions; implied from the *Briscoe* case; stated by various water rights scholars; and implied by TNRCC Rules § 295.158 for notice of change of place of use.	• Water Code § 11.085 stated no person may divert water from one watershed to another "to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted." • § 11.085 was interpreted by Supreme Court as requiring a two-part test: first you protect all existing water rights, junior or senior; then you balance the need for the water remaining.
Senate Bill 1	• Added "four corners" test as the new no-injury standard. (Water Code § 11.122). • Requires comparison of changed use to maximum paper right. • Standard generally rejected in the other western states. • May have constitutional problems.	• "No prejudice" language repealed. • Any proposed interbasin transfer or any existing water right is junior in priority to water rights granted before the transfer. (Water Code § 11.085(s) and (t)). • Balancing test to consider factors in regional plan that include historic use. (Water Code § 11.085(k)(2)(F)).

JUNIOR PRIORITY FACTS

- Without the junior priority language, the donor basin loses both the water transferred and dependability of the water rights retained in the basin.

- If there is sufficient water in the basin for all water rights, the junior priority does not appreciably diminish the value of the water transferred

- The junior priority language prevents interbasin transfers from expanding the scope of a water right (purpose of use, place of use, and the amount of water) to the detriment of other water rights in the basin.

- Deletion of the junior priority language removes the protection of water rights provided by Texas water law prior to Senate Bill 1. As stated by Texas Tech Law Professor and Texas water law treatise author, Dr. Frank Skillern, assigning junior priority or other limiting conditions having the same effect to water rights transferred out of the basin was the law in Texas prior to Senate Bill 1.

- The junior priority does not affect projects approved by the State to supply out-of-basin water needs. Junior priority only applies when a water right is amended to allow use of water in a manner not allowed by the original permit.

- The junior priority has no effect on new water supply projects. All new water projects have a priority date based on the date of filing the application for the permit for the project, whether the water is to be used in the basin or out of the basin.

- The junior priority language does not make a transferred water right perpetually junior to all inbasin water rights. The transferred right is junior only to water rights in existence at the time the application for the transfer is accepted for filing at the TNRCC.

- Some have claimed that the junior priority results in a taking of property. This is not true. Junior priority does not apply to rights previously granted by the State to the water right holder. It applies only to the grant of additional rights to the water right holder from the State.

- The Garwood Irrigation Company sale would have reduced the water supply of one water right holder in West Texas by approximately 10,100 acre-feet per year. This is enough water to serve more than 60,000 people in a water-short region. Private arrangements were made to eliminate this impact in exchange for dismissing the protest. Nothing in present or existing law required the settlement, and the area might not be so lucky the next time. There remain a significant number of very senior Colorado River water rights that remain marketable for out of the basin use.

- The municipal and industrial uses supplied by surface water suppliers in the Brazos Basin could be impaired by the sale of irrigation rights for use outside the basin.

- A balancing test is no replacement for the absolute prohibition against allowing interbasin transfers that injure existing water rights in the donor basin that existed in Texas before Senate Bill 1 and is carried forward in Senate Bill 1. The needs of a small farmer, city or industry are unlikely to win a balancing test with a big city.

  Although Water Code § 11.085 allows for compensation to the donor basin, there is no requirement for such compensation and the donor basin is not the owner of the rights being sold. For this reason, it is likely that there will be no compensation to anyone but the seller of water rights.

  All the junior priority provision does is insure that the donor basin's water rights will be protected in time of shortage to the same degree that they would have been protected prior to the transfer.

RIVER BASIN CONSEQUENCES OF JUNIOR PRIORITY

Brazos River: If sales of unused or underused irrigation water rights occur without junior priority, industrial and municipal water right holders in the Brazos Basin will be forced to buy more water from Brazos River Authority ("BRA") or develop other supplies to make up the shortfall from the transfer. Similarly, Brazos Port Water Authority will have to make up the shortfall to their customers in the Lake Jackson area. The transfer of the irrigation rights could also reduce the yield of BRA reservoirs that supply water to Waco, Temple, Belton, Round Rock, Georgetown, and Granbury by increasing the amount of water that would have to be passed.

Colorado River: If sales of unused or underused irrigation water rights occur without junior priority, the West Texas cities that depend on water from their own reservoirs or those of Colorado River Municipal Water District will have to find an alternative supply to make up for the shortage. This likely will be groundwater that will be mined at sites far from the cities at great expense, not only to the cities but also to the persons currently dependent upon the groundwater that will be targeted by the cities. The City of Austin, having its own water rights, will have to purchase more water from Lower Colorado River Authority. Recreational interests on the Highland Lakes will have to suffer from more frequent periods of lower lake levels.

Guadalupe River: If sales of unused or underused irrigation water rights occur without junior priority, the City of Victoria's investment in its $30 million surface water treatment plant will be diminished and its partial reliance on groundwater mining will continue. In-basin industries' multimillion-dollar investment in their water systems and industrial facilities will be diminished, increasing the groundwater mining of the aquifer or requiring purchases of more water from Guadalupe-Blanco River Authority.

Trinity River: If sales of unused or underused irrigation water rights occur without junior priority, Trinity Basin water right holders primarily in the Dallas/Ft. Worth metroplex could have the reliability of their rights reduced, requiring the development of expensive new water supplies sooner than necessary. Further, the metroplex's future water supply will likely come from East Texas. East Texas water can be obtained without removing the junior priority protection and the major metroplex wholesale water suppliers do not support its removal.

WHAT JUNIOR PRIORITY MEANS TO UPPER COLORADO RIVER BASIN REGION

- Without the private arrangement with Lower Colorado River Authority, which has the same effect as junior priority, the Garwood Irrigation Company transfer would have reduced the future water supply of Colorado River Municipal Water District ("CRMWD") by approximately 10,100 acre-feet per year (enough water to serve more than 60,000 people).

- This estimate of impact only considers impact to CRMWD reservoirs. Other reservoirs such as Twin Buttes, Lake Nasworthy, Lake Brownwood, Lake Coleman, Lake O.C. Fisher, Champion Creek, and Lake Colorado City also would likely be adversely impacted.

- The 10,100 acre-feet per year impact was estimated by CRMWD's consultants. Every 1,000 acre-feet of water that is lost from the region means that 6,000 fewer people can be supplied.

- The only other estimate of the potential impact of the Garwood transfer only considers the impact on the City of Austin (the most senior municipal water right along the Colorado River). Even so, this estimate substantially underestimates the impact on Austin because it evaluates the impact from changing the use of water from irrigation to municipal while ignoring the more substantial impact that will result from use of water that was historically never used.

- There are other senior water rights on the Lower Colorado River that could be transferred and, absent the junior priority, could reduce the region's water supply by tens of thousands of acre-feet.

EFFECT OF JUNIOR PRIORITY
(Hypothetical Basin)

			Dry Year		Wet Year	
Water User	Permitted Amount	Max. Historical Use	After the Transfer without Junior Priority	After the Transfer with Junior Priority	After the Transfer without Junior Priority	After the Transfer with Junior Priority
City A (1910)	25,000	25,000	25,000	25,000	25,000	25,000
Farmer B (1920)	25,000	25,000	25,000	25,000	25,000	25,000
Seller C (1930)	50,000	5,000	5,000	5,000	5,000	5,000
C's Buyer			45,000	20,000	45,000	45,000
Farmer D (1940)	15,000	15,000	0	15,000	15,000	15,000
Town E (1950)	10,000	10,000	0	10,000	10,000	10,000
In-Basin Use		80,000	55,000	80,000	80,000	80,000
Out-of-Basin Use			45,000	20,000	45,000	45,000
Total	125,000	80,000	100,000	100,000	125,000	125,000

All Values in Acre-Feet Per Year

Average Year: 100,000 Acre-feet/yr of Water Available

Water Rights in Order on Stream with Time Priority	Max. Historical Use	After C Sells 20,000 ac-ft/yr Water Right For Out-of-Basin Use
A 1910 Permit (25,000 ac-ft/yr)	25,000	25,000
C 1930 Permit (25,000 ac-ft/yr)	5,000	5,000 = C's Use 20,000 = C's Buyer
B 1920 Permit (25,000 ac-ft/yr)	25,000	25,000
E 1950 Permit (25,000 ac-ft/yr)	20,000	0
D 1940 Permit (25,000 ac-ft/yr)	25,000	25,000
	Total Historical Inbasin Water Use = 100,000 ac-ft/yr	Total Inbasin Water Use After Sale = 80,000 ac-ft/yr

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Water Rights in Texas

❖ Ownership of Water Rights

Groundwater:

Outside groundwater districts, and unless rights in groundwater were previously severed from the land, a landowner may pump all the water he wants subject to limited restrictions on waste and land subsidence.

Surface Water:

Flowing surface water is "owned" by the State and held in trust for the public. The State grants to individuals the right to store and use water, under statutory standards, and with express conditions.

Surface water rights granted by the State to individuals are rights of use, that are real property interests. Rights become "vested" or "perfected" to the extent water is beneficially used. Rights that go unused are subject to cancellation by the State. Until an unused right is cancelled, the holder can continue to perfect its right up to the maximum amount of use authorized, under the terms and conditions imposed.

Water that is reduced to possession becomes personal property, but it still is subject to state-imposed conditions of use.

❖ Standards for Granting a Water Right

When a new right to appropriate state water is granted, Water Code § 11.134, among other provisions, requires that the following considerations be satisfied:

- unappropriated water is available;
- no impairment of existing water rights;
- evidence of conservation;
- finding that not detrimental to the public welfare;
- environmental and water quality impacts considered;
- hydrologic connection with groundwater considered; and

- consistent with regional/state water planning.

❖ Scope of a Surface Water Right

The scope of the right to surface water is limited strictly to the terms of the appropriation. A surface water right typically specifies:

- source of supply;
- the purpose for which water may be used (municipal, industrial, irrigation, recreation . . .);
- the place where water may be used, including whether use is authorized in a different basin;
- the location and rate at which water may be diverted from a watercourse;
- the authority to store or "impound" water in a reservoir, if any; and
- time priority.

Special conditions also may be added at the time water is appropriated, for a number of reasons including to protect other water rights and for environmental and water quality protection, or to require return of surplus water.

❖ Time Priority of a Surface Water Right

A critical element of all surface water rights is the time priority of appropriation. In Texas, the first in time is the first in right. A "senior" water right will be satisfied up to his actual need for water before the next in time, or "junior" water right has the right to store or divert water. A water right simultaneously is junior to those who came before and senior to those whose rights were granted after.

The priority system is more difficult in practice than in theory, partly because the right of appropriation attaches to "flow" as much as to "volume." One article describes that the effect of an appropriator's use on streamflow is a complex product of rate of diversion; point of diversion; amount of water diverted; the times or seasonality of diversion; amount, place and timing of return flows; and other factors.

❖ Transfers of Existing Surface Water Rights

A water right holder has an absolute right to sell the water right for the same purpose and place of use. When the sale is for a *different* purpose and place of use, then the State's authority again is involved. The State must ensure both that the changes proposed do not harm other water appropriators and that the change is not detrimental to the public welfare. Both of these standards traditionally have been implied from statute and expressed in court opinion. By express statute, the State also will look at the impact of the change on environmental values.

❖ Injury to Other Water Rights

Injury occurs if another appropriator is deprived of the pre-transfer quantity and quality of water available; if another appropriator's legal obligation to senior water right holders is increased; or if the continuation of stream conditions as they existed at the time of the person's appropriation is affected substantially, for example. Such injuries can be caused by a changed point of return flow; an increased diversion rate; an increased rate of consumption; a change in seasonal patterns of use, for example from the irrigation growing season to steady municipal use; a change in stream conveyance losses; or a change that alters the order of diversion from a stream, among other things.

The fact that these or other injuries would occur from a change of use does not preclude a transfer, however. Amendments may be granted with special conditions, such as limitations on what minimum flow must be maintained past the changed diversion point to protect downstream water users and environmental values. An amendment also may subordinate the time priority of the transferred right to those existing rights that are injured.

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INTERBASIN TRANSFERS IN TEXAS

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SLIDES

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Water Marketing in Texas

- In-Basin
- Out-of-Basin

California Water Plan

The initial rush of enthusiasm for water marketing stimulated much discussion about supposedly unused water. Some water users in the State hold rights to more water than they currently use to meet their needs. Why not sell those rights to others?

Such arrangements looked attractive to both prospective sellers and buyers. The sellers would receive payment for something they were not using, while the buyers would meet urgent water needs. This view, however, overlooks the fact that water to meet the transferred rights has been part of the basin supply all along, and has almost always been put to use by downstream water right holders or is supporting an environmental need. This type of marketing arrangement became known as a "paper water" deal: the money goes to the seller, while the water is sold to the buyer from the supply of an uninvolved third party.

In analyzing water marketing and water conservation proposals, the Department uses the terms real water and new water to contrast with paper water. Real water is water not derived at the expense of any other lawful user, i.e., water that satisfies the Water Code's no injury criterion. New water is water not previously available.

Senate Bill 1

- Passed in 1997
- Significant Unresolved Issues:
  - Interbasin Transfers
    - New Permits
    - Amendments
  - In-Basin Permit Amendments
    - "Four-Corners Doctrine"
  - Water Reuse
    - Reuse after discharge into a watercourse

Texas Water Code § 11.085 (prior to SB 1)
Interwatershed Transfers

(a) No person may take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, watercourse, or watershed in this state into any other natural stream, watercourse, or watershed *to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted.*

(b) No person may transfer water from one watershed to another without first applying for and receiving a permit from the commission to do so. Before issuing such a permit, the commission shall hold a hearing to determine the rights that might be affected by the transfer. The commission shall give notice and hold the hearing in the manner prescribed by its procedural rules.

(c) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $100 nor more than $500 or by confinement in the county jail for not more than six months.

(d) A person commits a separate offense each day he continues to take or divert water in violation of this section.

Case Law

- *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752 (Tex. 1966):
  - Established two-part test before an interbasin transfer could be authorized:
    - Would existing water rights in the basin of origin be impaired by the transfer? If there would be impairment, there could be no transfer.
    - To the extent water remains in the basin of origin in excess of that required to protect existing rights from impairment, then, as to that excess water, the future benefits and detriments expected to result from the transfer must be balanced. If the benefits outweigh the detriment, the transfer can go forward.

Commentators

- Interbasin transfers are junior in time to water rights existing at the time of the amendment to authorize the transfer. 1 Frank Skillern, Texas Water Law 82-83 (1988).

TNRCC Interpretations

- In the past, TNRCC made new transfers and most amendments junior in priority to all water rights existing at the time of the transfer.
- Mackenzie Municipal Water Authority's permit amendment to authorize transbasin diversions and use:
  - "Section 11.085 indicates that transwatershed [interbasin] diversions have the potential for harming water rights in the basin of origin. The amendment, therefore, is in the nature of a 156.04.10.001-.002 amendment and *should be given a new priority date."* TDWR Memorandum re: Mackenzie Municipal Water Authority Application to Amend Permit No. 2297 to authorize transbasin diversions and use 2 (July 13, 1982) (on file with TNRCC) (emphasis added).

Other Permits

- Sabine River Authority's Lake Tawakoni and Lake Fork water rights
- Guadalupe-Blanco River Authority's Canyon Reservoir water rights
- City of Texarkana's Wright Patman Reservoir water rights
- Franklin County Water District's Lake Cypress Springs water rights
- City of Clyde's Lake Clyde water rights

Regulatory Guidance

– Prior drafts of TNRCC's Regulatory Guidance Document show that as recently as 1994, TNRCC staff felt that amendments to water rights seeking interbasin transfer authorization should be "subordinate [junior] to existing water rights." Tex. Natural Res. Cons. Comm'n, Draft of *A Regulatory Guidance Document for Applications to Divert, Store or Use State Water* 5 (March 1994).

SB 1 Rewrites Interbasin Transfer Law

- TNRCC Commissioners Initiate Changes
  - TNRCC desires to improve on the very general balancing test in Water Code § 11.085 and to provide specific requirements and hearing procedures
- Initial Drafting
  - Absolute protection for existing water rights dropped in favor of a balancing test between the two basins for impacts to water rights and other interests

SB 1 Rewrites Interbasin Transfer Law (cont' d)

- Legislative Hearings on SB 1
  - –Impact of elimination of absolute protection for existing water rights standard from an interbasin transfer added to an existing right in favor of a balancing test was not initially apparent to persons not involved in TNRCC' s permit process
  - –By the time that SB 1 made it to the House, enough awareness existed such that the House amended the Senate version to protect existing water rights from interbasin transfers and restore the protections in existing law

SB 1 Rewrites Interbasin Transfer Law (cont' d)

- Final Language
  - House-passed version of SB 1, and final version added following language to Water Code § 11.085:

    "Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing." Tex. Water Code Ann. § 11.085(s) (Vernon 2000)

Dilemma Facing Legislature and Water Planners Today

- Treating water as a simple commodity flowing to highest bidder will disadvantage smaller cities, rural areas and agriculture that cannot count on winning balancing tests against the State' s largest cities.
- Larger cities having plenty of water may lose out to cities having an immediate need.
- If interbasin transfers of underutilized senior water rights are the least expensive supply, those transfers will be pursued first before development of in-basin reservoir projects. And, why not? Those in-basin projects still will be available even when out-of-basin supplies are exhausted.
- Interbasin transfers are not "least-cost" when factoring in the long-term costs to the basin of origin to find a future water supply (when before the transfer there was an adequate supply) and, just as significantly, the costs to individual water right holders who stand to lose their supplies if not protected.

Solution: Regional Planning that Emphasizes New and "Real" Water

- SB 1 put into motion a significant regional water planning process that can lead the way to meeting all of Texas' water supply needs.
- SB 1 also required state agencies to perform new water availability modeling studies (WAMs) to develop adequate information about existing water uses and supplies.
- Until the impacts of interbasin transfers can be fully calculated by the new WAMs, it would be a mistake to leave existing water right holders and regional economies at risk by repealing the junior priority protection and allowing a land-rush-type grab for interbasin transfers.
- Transferring water away from some users to supply others will not solve Texas' future water needs. Only conservation, water reuse and increasing the quantity of the overall dependable water supply are real solutions to Texas' water needs.

Common Arguments Heard in the Junior Priority Debate

- Willing Buyer and Willing Seller.
  - Interdependency of surface water rights not recognized, i.e., flow left unused is likely long used by junior rights.
- Transfers will only occur from areas of the State that have surpluses of water.
- Junior priority protection prohibits the receiving basin from getting a water supply that is dependable in a drought.
  - Both of these claims cannot be true. If there truly is a surplus of water, even the most junior of rights will be satisfied in the driest of times.
- Junior priority provision makes water rights otherwise available for sale to a new user worthless.
  - Then, repeal of the protection would make at least some of the rights of existing users worthless by parallel reasoning. Fairness would seem to dictate that the burden fall on the willing seller and willing buyer who would change the basis on which the water rights were granted in the first place.

Common Arguments Heard (cont' d)

- Junior priority language makes it harder to obtain an interbasin transfer.
  - It is a black and white rule unlike the many subjective criteria found in the rest of § 11.085 after SB 1's changes.
- Junior priority language is impediment to even interbasin transfers for new permits.
  - The junior priority protection does not impact new permits and construction of new reservoirs for interbasin transfers—new permits and reservoirs would have a new priority anyway.
  - The priority change only benefits water rights existing at the time of the proposed transfer--not future permits that might be issued or amended after the permit is amended or issued.
    - An interbasin transfer, once approved, is not perpetually junior in time even to in-basin permits issued after the interbasin transfer amendment.

Common Arguments Heard (cont' d)

- Junior priority protection is not a taking of a water right holder's property.
  - A water right holder's property is not taken when adding a new interbasin transfer if a junior priority is required for the new transfer due to the nature of the property interest in water. The water right grant by the State only allows a use for a particular purpose and place of use. Case law holds that TNRCC can deny or modify water rights if a significant change in purpose or place of use is requested.
- Removal of junior priority protection is necessary to protect groundwater resources.
  - Today's pressure on groundwater resources is a result of ready availability and the ease of developing an unregulated or lightly regulated resource vs a highly regulated resource in surface water.
  - Such pressure will exist with or without junior priority.

Common Arguments Heard (cont' d)

- TNRCC precedent prior to SB 1 supports removal of junior priority protection (TNRCC 9/23/97 Memo):

  TNRCC staff prepared a memo discussing 80 or so interbasin transfers that have been issued and some of the few amendments to an existing right that authorized a new interbasin transfer.

  Overwhelming majority of the interbasin permits were new permits that would have a junior priority anyway.

  In the 8 specific amendments discussed in the memo, TNRCC in some cases imposed a junior priority but in somecases did not.

  Of the 8 interbasin transfer amendments approved prior to SB 1 and discussed in the memo, three were given junior priority, one did not mention the time priority, one did not mention that the transfer was interbasin (it was for potable water), one was contested and allowed to retain its original priority date only after a settlement was reached with the protestants, and two retained the original priority date but were uncontested.

Common Arguments Heard (cont' d)

The memo fails to discuss the MacKenzie application's staff memo that clearly states that junior priority was required by law.

The memo omits discussion of the multiple interbasin transfer amendments to GBRA's Canyon Reservoir permit that were given a junior priority as well as the amendments to three water rights, two for Sabine River Authority and one for City of Texarkana, that also imposed a junior priority on the particular interbasin transfer amendment.

Common Arguments Heard (cont' d)

The memo failed to discuss an amendment to the Garwood Irrigation Company water right where TNRCC, in anticipation of a future amendment to allow for an additional interbasin transfer, stated:

"Nothing herein shall be construed to be a determination by the Commission that it will grant any future application by certificate owner, or by any other water right holder, to amend any water right to change the place of use, purposes of use, point of diversion, annual diversion or rate of diversion authorized under the water right as it exists at that time. All issues that may be relevant to any such proposed amendment and the impact of such amendment on other water right holders, *including priority dates*, shall be considered by the Commission at that time. . . ."

Common Arguments Heard (cont' d)

Since the majority of amendments adding an interbasin transfer that have been discovered were given a junior priority, it makes more sense to argue that politics, ignorance or lack of protests was the reason that the priority dates were not changed in the few permits that maintained the priority rather than that TNRCC precedent prior to SB 1 did not support inclusion of the junior priority language.

Summary

- Unless the intent of the legislature is to eliminate the past and current § 11.085's protection from amendments for existing water rights, there is no historical reason not to continue to include a junior priority provision.
- Without the junior priority language or some substitute, the absolute protection of existing water rights in the originating basin, as recognized by the Texas Supreme Court, would be eliminated in favor of a balancing test.
- Little protection for existing water rights would be afforded by general transfer law, i.e., the "four-corners doctrine," that exists after SB 1 removed most historical protections from in-basin water right amendments.
- Other water right holders who have relied on the continued existence of the status quo of the other water rights in the basin would be denied their right entitling them to protection from interbasin transfer amendments with the historical "no prejudice" protections.

Conclusion

- The junior priority provision does not prohibit transfers. It does not prevent areas of the State in need of water from getting water.
- The junior priority protection does require a would-be buyer to develop its transfer projects in a manner that will not diminish the supply available to existing water users in the basin of origin.
  - Storing water in times of plenty and investing in infrastructure for conveyance of supplies can accomplish that.
- Without the junior priority protection, the great majority of transfers would leave less water for junior water rights in the basin of origin during dry periods after the interbasin transfer.
- Remember, only one water right in the basin is senior to all other water rights, so the universe of potentially impacted permits is large.

SPEECH

INTERBASIN TRANSFERS IN TEXAS

by

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Introduction

Just a few short years ago, the Texas Legislature and communities all over the State were focused on water supply issues as omnibus water legislation passed into law under the caption of Senate Bill 1 ("SB 1"). Provisions of SB 1 literally touched every part of Texas. Attempts last legislative session--and no doubt this coming session--to undo a key provision of SB 1 regarding transfers of water from one area of Texas for use in another is receiving only little public attention by comparison. Yet, today, at the State Capitol and among water providers, sentiment about "interbasin transfers" still runs high. At stake is whether existing surface water uses in a river basin or new uses in another river basin will suffer first in a drought after a transfer of an existing senior right.

The time priority of individual surface water rights determines who may divert or store water first in a drought and who may do so next. New projects always are the most junior in time priority when a new water right is granted by the State. But a more difficult question arises when an old right, perhaps even a historically unused one, is sold for a new use. Water rights are granted by the State of Texas with express conditions for purpose and place of use, and with a requirement that the water be put to beneficial use. Changes in purpose or place of use, among other changes, require a new state action under statutory standards.

For more than eighty years, Texas law allowed no prejudice to persons or property when water was transferred to a new use outside a river basin. In effect, during a drought, satisfaction of basin of origin water rights existing at the time of the transfer would be assured by the State before the new out-of-basin use would be allowed. Changes to the interbasin transfer statute were initiated by the Texas Natural Resource Conservation Commission ("TNRCC") Commissioners desiring to improve on the very general balancing test in Texas Water Code § 11.085 and to provide specific requirements and hearing procedures. Somehow, during the development of the first version of SB 1, the absolute protection to existing water rights was dropped from the proposed law in favor of a balancing test between the two basins for impacts to water rights and other interests, such as environmental and socioeconomic.

The problem in understanding what was occurring to the protection of existing rights is that, without actually having been involved in the arguments at the TNRCC over how to interpret the prior law for water right amendments adding a new interbasin transfer during the permitting process, it was very difficult to understand just what the Senate-passed version of SB 1 would have done to the protection afforded in-basin water rights from an interbasin transfer added to an existing right. Problems of interpretation were compounded when the TNRCC staff failed, at least in public hearings, to put before the legislature the TNRCC's and its predecessor agencies' (collectively, "Commission") past policy of requiring a junior priority in many cases for an interbasin transfer amendment. While sufficient time was not available to make this point clear in

the Senate, by the time that SB 1 made it to the House, there was enough awareness that without the House-passed version's amendments protecting existing water rights from interbasin transfers, the protections in existing law would have been eliminated. Over time, the result would be a significant reallocation of water in many river basins, including the Guadalupe, Colorado, Brazos, Trinity, and Neches River Basins. In the House-passed version of SB 1, and ultimately the final version, the following language was added to § 2.07 as Water Code § 11.085(s):

> Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing.

TEX. WATER CODE ANN. § 11.085(s) (Vernon 2000).[1]

Debate in the legislature has demonstrated clearly that those who urge repeal of the junior priority protection would treat water as a simple commodity flowing to the highest bidder. Many Texans feel that, to the contrary, water is a precious resource essential to Texas' future and that rural and agricultural Texas as well as the smaller cities cannot count on winning balancing tests against the capacity of this State's largest cities for growth. Even those from areas of Texas that rely on groundwater resources can analogize to the impact that well fields built for distant use can have on individual well-owners and regional economic viability.

Testimony supporting repeal of the junior priority protection revealed a bottom-line approach that some metropolitan areas will take for buying existing water rights. If interbasin transfers of underutilized senior water rights are the least expensive supply, those transfers will be pursued first, before development of in-basin reservoir projects. And, why not? Those in-basin projects still will be available even when out-of-basin supplies are exhausted. Interbasin transfers are not "least-cost" when one factors in the long-term costs to the basin of origin to find a future water supply (when before the transfer there was an adequate supply) and, just as significantly, the costs to individual water right holders who stand to lose their supplies if not protected.

Transferring water away from some users to supply others will not solve Texas' future water needs. Only conservation, water reuse and increasing the quantity of the overall dependable water supply can be real solutions.

The junior priority provision does not prohibit transfers. It does not prevent areas of the State in need of water from getting water. The junior priority protection does require a would-be buyer to develop its transfer projects in a manner that will not diminish the supply available to existing water users in the basin of origin. Storing water in times of plenty and investing in infrastructure for conveyance of supplies can accomplish that.

SB 1 put into motion a significant regional water planning process that can lead the way to meeting all of the water supply needs of the State of Texas. As part of this process, the legislation also required state agencies to perform new water availability studies since the State does not now have adequate information about existing water uses and supplies. The results of this important work will not be completely known for a few more years. Until the impacts of interbasin transfers can be fully calculated, it would be a mistake to leave existing water right holders and regional economies at risk by repealing the junior priority protection. The effects of a land-rush type grab for interbasin transfers, before the impacts can be meaningfully evaluated, could not be reversed easily, assuming that courts would allow such a change to apply retroactively to existing water rights.

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[1] A similar limit applying only to the Colorado River Basin can be found at § 11.085(t).

Interbasin Transfer Law Prior to SB 1

As mentioned, before SB 1, Water Code § 11.085, the law regarding interbasin transfers, contained an absolute protection for existing water rights *and* a general balancing test between the two basins. Interbasin transfers of water that "prejudice" any person or property within the basin of origin were prohibited. TEX. WATER CODE ANN. § 11.085. This provision was in effect from 1913 until the passage of SB 1 when the junior priority provision was substituted. The Supreme Court has held that this provision means that existing water rights cannot be impaired. *See City of San Antonio v. Texas Water Comm'n,* 407 S.W.2d 752, 758 (Tex. 1966). The San Antonio case established a two-part analysis that had to be used under § 11.085 prior to SB 1 before an interbasin transfer could be authorized:

- Would existing water rights in the basin of origin be impaired by the transfer? If there would be an impairment, there could be no transfer.

- To the extent that there is water in the basin of origin in excess of that required to protect existing rights from impairment, then, as to that excess water, the future benefits and detriments expected to result from the transfer must be balanced. If the benefits outweigh the detriment, the transfer can go forward.

Id. Additionally, other case law and commentators have stated that under the pre-SB 1 version of § 11.085, interbasin transfers are junior in time to water rights in existence at the time of the amendment to authorize the transfer. FRANK SKILLERN, TEXAS WATER LAW, ch. 3 at 82-83 (Sterling Press 1988) (citing *Halsell v. Texas Water Comm'n,* 380 S.W.2d 1, 14 (Tex. Civ. App.–Austin 1964, writ ref'd n.r.e.)).

In the past, the Commission made new transfers and most amendments junior in priority to all water rights existing at the time of the transfer. Attached is a Commission staff memorandum discussing how a water right amendment seeking to add an interbasin transfer would be junior in priority to existing water rights both junior and senior to the one that is being amended. *See* **Attachment 1.** This memorandum states:

> Section 11.085 indicates that transwatershed [interbasin] diversions have the potential for harming water rights in the basin of origin. The amendment, therefore, is in the nature of a 156.04.10.001-.002 amendment and *should be given a new priority date.*

Memorandum from Gwen Webb, Attorney, Texas Dep't of Water Resources, to The File, re: Mackenzie Municipal Water Authority Application to Amend Permit No. 2297 to authorize transbasin diversions and use 2 (July 13, 1982) (on file with TNRCC) (emphasis added). Also, attached are permits where the Commission granted permit amendments seeking an interbasin transfer with a new junior priority. *See* **Attachment 2.** Prior drafts to the TNRCC's Regulatory Guidance Document show that as recently as 1994, the TNRCC staff felt that amendments to water rights seeking interbasin transfer authorization should be "subordinate [junior] to existing water rights." Tex. Natural Res. Cons. Comm'n, Draft of *A Regulatory Guidance Document for Applications to Divert, Store or Use State Water* 5 (March 1994). *See* **Attachment 3.** The final draft of the Regulatory Guidance Document curiously removed this section from the document despite its accurate representation of Commission precedent. As also can be seen by the TNRCC's current Regulatory Guidance Document, the TNRCC, under its general authority, did require plans and studies that now will be specifically required by statute and, in fact, be more comprehensive. *See* **Attachment 4.**

The TNRCC staff, perhaps in response to previous versions of this paper criticizing the TNRCC's failure to admit to past precedent, subsequently prepared a memorandum discussing eighty or so interbasin transfers that have been issued and some of the few amendments to an existing right that authorized a new interbasin transfer. The TNRCC memorandum has been cited in speeches and legislative testimony and comment to primarily suggest that interbasin transfers are common and occasionally to suggest that the junior priority language was not based on prior law or precedent.

Initially, it should be remembered that the overwhelming majority of the interbasin permits were new permits that would have a junior priority anyway. It is only in amendments to water rights seeking to add a new interbasin transfer where the junior priority issue becomes important. In the eight examples discussed in the TNRCC memorandum, the Commission in some cases imposed a junior priority but in some cases did not. Summarizing the TNRCC memorandum's results of the eight interbasin transfers approved prior to SB 1 that were found in TNRCC records, three amendments were given junior priority, one amendment did not mention the time priority, one amendment did not mention that the transfer was interbasin (it was for potable water), one amendment was contested and allowed to retain its original priority date only after a settlement was reached with the protestants, and two amendments retained the original priority date but were uncontested. ***See* Attachment 5.** The attempt in the memorandum to distinguish the MacKenzie MWA and Franklin County Water District permits (contained in Attachment 2 herein) by asserting that the priority changes occurred prior to the adjudication appears to be an effort to rationalize the TNRCC staff's incorrect statements to the legislature last session rather than a reasoned argument. The stream adjudication has nothing to do with a priority determination. The TNRCC also fails to discuss the MacKenzie application's staff memo that clearly states that junior priority was required by law. The TNRCC memorandum's statement that the failure to set out a time priority means that the original date is assumed contradicts sworn testimony by TNRCC staff who testified that if the amendment is silent, the priority date is the date that the application was filed; that is, junior. Similarly, it is unknown whether the Commission was aware of the interbasin transfer in the North Texas MWD authorization to sell potable water in the Sabine River Basin. Also, the TNRCC memorandum omits discussion of the multiple interbasin transfer amendments to the Guadalupe-Blanco River Authority's Canyon Reservoir permit that were given a junior priority, as well as the amendments to three water rights, two for the Sabine River Authority and one for the City of Texarkana, that also imposed a junior priority on the particular interbasin transfer amendment. These permits and amendments are included herein. *See* **Attachment 6.**

While, at the time, not an amendment seeking a new interbasin transfer, the TNRCC's treatment of the City of Corpus Christi's first amendment to the Garwood Irrigation Company water right after its purchase of a portion of the right also is instructive. Initially, a change of use was authorized by the TNRCC for the Garwood right allowing for municipal and industrial use but only in the Garwood service area. This authorization was issued without notice. In that amendment, the TNRCC, in anticipation of the future application for an interbasin transfer, stated:

> Nothing herein shall be construed to be a determination by the Commission that it will grant any future application by certificate owner, or by any other water right holder, to amend any water right to change the place of use, purposes of use, point of diversion, annual diversion or rate of diversion authorized under the water right as it exists at that time. All issues that may be relevant to any such proposed amendment and the impact of such amendment on other water right holders, *including priority dates*, shall be considered by the Commission at that time. Notice of any such application shall be given by the Commission to any affected person that gives the Commission a written request for such notices.

(Emphasis added). When the water right was subsequently sought to be amended to authorize use in Corpus Christi and elsewhere out of the basins previously authorized for use, the City of

Austin, Colorado River Municipal Water District and others protested the amendment saying that, among other things, the transfer should be junior. The protests were dropped only after the purchaser of the rest of the Garwood water right, the Lower Colorado River Authority, agreed to protect Austin and CRMWD from any impacts caused by the Corpus Christi transfer.

Of the small universe of permits at the Commission that have been amended to allow an interbasin transfer without a priority change, it makes more sense to argue that politics, ignorance or a lack of protests was the reason that the priority dates were not changed rather than that Commission precedent prior to SB 1 did not support inclusion of the junior priority language. This is particularly true in light of the staff memo in the MacKenzie application. In any event, the majority of amendments adding an interbasin transfer were given a junior priority, and the TNRCC has never, in any public meeting, acknowledged the Commission precedent as it existed on this subject prior to SB 1.

Unless the intent of the legislature is to eliminate the past and current § 11.085's protection from amendments for existing water rights, there is no historical reason not to continue to include a junior priority provision.

Myths

Besides the misinformation regarding the law on interbasin transfers prior to SB 1's passage, there are reoccurring statements made about the effect of the junior priority language on future interbasin transfers.

Proponents of interbasin transfers emphasize that trade in state-granted water rights is between "willing buyers and willing sellers." This argument has facial appeal but is too simplistic. Yes, an entity that holds surface water rights which have never been used and are otherwise subject to cancellation by the State, or are no longer needed, will be willing to sell water rights at a good price. However, surface water rights are interdependent, and flow that has been left unused or returned to the stream likely has been long used by rights that are more junior in time priority. The seller could reap its profit while the supply is taken away from other water users who are not party to the transaction. The rights of those other water users have historically been entitled by law to protection. *See State Bd. of Water Eng'rs v. Slaughter,* 382 S.W.2d 111 (Tex. Civ. App.–San Antonio 1964), *writ ref'd n.r.e.,* 407 S.W.2d 467 (Tex. 1966) (rights acquired under prior irrigation act were vested rights that legislature could not constitutionally cut off); *see also San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa,* 972 P.2d 179 (Ariz. 1999) (legislation may not disturb vested water rights by retroactively changing the law to lessen protection given to junior water rights over senior water rights that may have been abandoned or terminated by of operation of prior law).

Some interbasin transfer promoters make a fatally inconsistent argument. They claim that transfers will only occur from areas of the State that have surpluses of water. They also claim that the junior priority protection is harmful because it means that the receiving basin would not be getting a water supply that is dependable in a drought. Both of these claims cannot be true. Think about it. If there truly is a surplus of water, even the most junior of rights will be satisfied in the driest of times. If, as one author of legislation to repeal the junior priority provision argued, the provision makes water rights otherwise available for sale to a new user worthless, then repeal of the protection would make at least some of the rights of existing users worthless by parallel reasoning. Fairness would seem to dictate that the burden fall on the willing seller and willing buyer who would change the basis on which the water rights were granted by the State in the first place.

The junior priority language does not make it any harder to obtain an interbasin transfer. It is a black and white rule unlike the many subjective criteria found in the rest of § 11.085 after SB 1's changes. The junior priority language also, as discussed above, does not impact new permits and construction of new reservoirs for interbasin transfers, since new permits and reservoirs would have a new priority anyway. Further, the priority change only benefits permits existing at the time of the proposed transfer--not future permits that might be issued or amended as is sometimes asserted. An interbasin transfer once approved is not perpetually junior in time even to in-basin permits issued after the interbasin transfer amendment.

A property right argument sometimes is made that a water right holder seeking to add a new interbasin transfer to his water right is having his property taken if a junior priority is required for the new transfer. This argument is nonsense. Remember, the State owns surface water. The water right grant by the State only allows a use for a particular purpose and place of use. The TNRCC, in fact, can deny in some cases a significant change of purpose or place of use to a water right. One of the few Texas cases on the subject, *Clark v. Briscoe,* 200 S.W.2d 674 (Tex. Civ. App.–Austin 1947, no writ), holds that the State can determine whether a water right amendment is detrimental to the public welfare without taking the water right holder's property. ***See* Attachment 7.**

Impact of Removing Junior Priority Language for Interbasin Transfers

Without the junior priority language or some substitute, language that absolutely protects existing water rights in the originating basin (first prong of old § 11.085 as recognized by the Texas Supreme Court) would be eliminated in favor of a balancing test for all interests involved (SB 1's language without the junior priority language and essentially the second prong of the Supreme Court test). Little protection for existing water rights would be afforded by the general transfer law, called the "four-corners" doctrine, that exists after SB 1 removed most historical protections when a water right is amended for a new in-basin use.[2] Other water right holders who have relied on the continued existence of the status quo of the other water rights in the basin would be denied their right entitling them to protection from interbasin transfer amendments with the historical "no prejudice" protections. But even if all involved in the debate cannot agree on the law existing prior to SB 1, it would be extremely helpful--so that the consequences of removing the junior priority protection are not obfuscated behind misleading rhetoric--if the proponents of removing the junior priority protection would at least acknowledge the absolute fact that, in the great majority of transfers, without the junior priority language, junior in-basin rights would have less water during dry periods after the interbasin transfer. With this agreement, then at least the legislature and water right owners would know the true impact of removal.

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[2] This change to Water Code § 11.122, found in Subsection (b), may also have constitutional problems if applied to permits granted before SB 1, since the water rights in existence at the time of SB 1 should be entitled to the protection from amendments that impair their rights. *See Slaughter,* 382 S.W.2d 111 (rights acquired under prior irrigation act were vested rights that legislature could not constitutionally cut off); *San Carlos Apache Tribe,* 972 P.2d 179 (legislation may not disturb vested water rights by retroactively changing the law to lessen protectic given to junior water rights over senior water rights that may have been abandoned or terminated by of operation of prior law).

ATTACHMENT 1

Texas Department of Water Resources

INTEROFFICE MEMORANDUM

TO : The File

DATE: July 13, 1982

THRU :

OCT 20 1982

FROM : Gwen Webb, Attorney

SUBJECT: Mackenzie Municipal Water Authority, Application to Amend Permit No. 2297 to authorize transbasin diversions and use

Mackenzie Municipal Water Authority seeks to amend Permit No. 2297 to authorize the supply of municipal and industrial water to its member cities: Tulia in Swisher County and Silverton in Briscoe County, Red River Basin; and Lockney and Floydada in Floyd County, Brazos River Basin.

The processing of this application is specifically governed by Texas Water Code, Section 11.085, and Rules 156.02.15.013 and 156.04.20.001. Additionally, the Commission has indicated in recent proceedings that it will be considering the guidelines set out in Texas Water Code, Section 16.052.

Section 11.085(a) states that no interwatershed transfers may be authorized "to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted." The prohibition is broad and seems to protect the basin of origin in several ways: (1) Interwatershed transfers are subject not only to existing senior and superior water rights, but also future water rights for irrigation municipal and domestic and livestock use in the basin of origin, since these uses are directly related to the water demands of persons and property; and (2) Water use as well as water quality is protected. Section 11.085 also states that a hearing must be held "to determine the rights that might be affected by the transfer," and that diversion of water in violation of this statute is a misdemeanor, with each day of diversion constituting a separate offense.

Department Rule 156.02.15.013 requires trans-watershed transfers to state the watershed of origin and the watershed of delivery in the application. Department Rule 156.04.20.001 requires that the basin of origin and the basin of delivery be named, that notice be issued in accordance with Section 11.132 in the watershed of origin and that notice be given to users of record in the watershed of delivery. In this case, basin-wide notice must be mailed and published in the Red River Basin, as well as almost the entire Brazos River Basin. Affected counties or portions of counties ar

Red River Basin

Deaf Smith	Donley	Knox
Parmer	Hall	Wilbarger
Castro	Motley	Baylor
Potter	Dickens	Archer
Randall	Hemphill	Clay
Swisher	Wheeler	Montague
Hale	Collingsworth	Cooke
Carson	Childress	Grayson
Armstrong	Cottle	Fannin
Briscoe	King	Lamar
Floyd	Hardeman	Red River
Gray	Foard	Bowie

Brazos River Basin

Floyd	Archer	Johnson
Crosby	Young	Hill
Garza	Stephens	McLennan
Borden	Eastland	Falls
Dickens	Jack	Milam
Kent	Palo Pinto	Lee
Scurry	Erath	Limestone
King	Comanche	Robertson
Stonewall	Hamilton	Burleson
Fisher	Mills	Leon
Nolan	Lampasas	Madison
Knox	Burnet	Brazos
Haskell	Parker	Washington
Jones	Hood	Austin
Taylor	Somervell	Grimes
Baylor	Bosque	Waller
Throckmorton	Coryell	Fort Bend
Shackelford	Bell	Brazoria
Callahan	Williamson	

Section 11.085 indicates that transwatershed diversions have the potential for harming water rights in the basin of origin. The amendment, therefore, is in the nature of a 156.04.10.001-.002 amendment and should be given a new priority date.

Section 16.052 provides:

> The executive director shall not prepare or formulate a plan which contemplates or results in the removal of surface water from the river basin of origin if the water supply involved will be required for reasonably foreseeable water supply requirements within the river basin of origin during the next ensuing 50-year period, except on a temporary, interim basis.

The Commission has indicated that it is not willing to authorize permits or amendments for interwatershed transfers unless there is evidence that there is a surplus of water in the watershed of origin for at least 50 years. This determination will involve coordination with the Planning and Development staff. The 50-year guideline can be considered useful since, in connection with Section 11.085, it does establish a temporal frame of reference. The amendment is likely to be issued if the Department can show that the amendment will not prejudice the persons or property in the Red River Basin. In making its recommendation, the planning staff should be aware that the Commission is likely to hold the staff accountable for those assumptions in future permits. In view of the Commission's quest for consistency, the Department may want to make the standards broad and reasonably flexible.

AATA Climicit
5-13-82

ATTACHMENT 2

MacKenzie Municipal Water Authority

Water Right

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 02-5211 OWNER: MacKenzie Municipal Water Authority
Route 1, Box 14
Silverton, Texas 79257

COUNTIES: Swisher, Briscoe and Floyd PRIORITY DATES: June 26, 1967 and July 19, 1982

WATERCOURSE: Tule Creek, tributary of Prairie Dog Town Fork Red River, tributary or the Red River BASIN: Red River

WHEREAS, by final decree of the 251st Judicial District Court of Potter County, in Cause No. 67865-C, In Re: The Adjudication of Water Rights in the Upper Red River Segment of the Red River Basin dated January 29, 1987 a right was recognized under Permit 2297 authorizing the MacKenzie Municipal Water Authority to appropriate waters of the State of Texas as set forth below:

WHEREAS, by an amendment to Permit 2297, issued on September 8, 1982, the Texas Water Commission authorized the use of the impounded water for recreation purposes and a transbasin diversion and use of 50 percent of authorized amount of water to the Authority's service area in the Brazos River Basin;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Red River Basin is issued to the MacKenzie Municipal Water Authority, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and a 46,450 acre-foot capacity reservoir on Tule Creek and impound therein not exceed 13,935 acre-feet of water. The dam is located in the Beaty, Seale and Forwood Survey 55, Abstract 144, Briscoe County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 4000 acre-feet of water per annum for municipal purposes and 1200 acre-feet of water per annum for industrial purposes. Owner is authorized a transbasin diversion and use of not to exceed 50 percent of the authorized amounts for use in the Authority's service area in the Brazos River Basin.

B. Owner is also authorized to use the water impounded in the aforesaid reservoir for recreation purposes.

3. DIVERSION

A. Location:
At the perimeter of the aforesaid reservoir.

B. Maximum rate: 20.00 cfs (9,000 gpm).

4. PRIORITY.

A. The time priority of owner's right is June 26, 1967 for the impoundment of water and the diversion and use for municipal and industrial purposes.

B. The time priority of owner's right is July 19, 1982 for the transbasin diversion and use of the impounded water for recreation purposes.

5. SPECIAL CONDITIONS

A. Owner shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

B. Owner shall maintain the following:

(1) Continuous reservoir content and lake level measu station;

(2) Record of outflow from reservoir;

(3) Daily record of diversions from reservoir;

(4) Establish and monument an adequate number of sedimentation ranges prior to impoundment of water for future determination of reduction of water storage capacity by sediments; and

(5) Provide revised elevation-area-capacity data as determined from surveys of sedimentation ranges.

The locations of pertinent features related to this certificate are shown on Page 11 of the Upper Red River Segment Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 251st Judicial District Court of Potter County, Texas, in Cause No. 67865-C, In Re: The Adjudication of Water Rights in the Upper Red River Segment of the Red River Basin dated

January 29, 1987 and supersedes all rights of the owner asserted in tha cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Red River Basin.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Red River Compact.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Paul Hopkins

Paul Hopkins, Chairman

DATE ISSUED:

SEP 25 1987

ATTEST:

Karen A. Phillips

Karen A. Phillips, Chief Clerk

Franklin County Water District

Water Right

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 04-4560

OWNERS: Franklin County Water District
P. O. Box 559
Mount Vernon, Texas 75457

Texas Water Development Board
Attn: Water Availability Data & Studies
P. O. Box 13231
Capitol Station
Austin, Texas 78711

COUNTY: Franklin

PRIORITY DATES: January 31, 1966, July 20, 1970, October 6, 1980 and April 18, 1983

WATERCOURSE: Cypress Creek (Lake Cypress Springs)

BASIN: Cypress Creek

WHEREAS, by final decree of the 188th Judicial District Court of Gregg County, in Cause No. 86-257-A, In Re: The Adjudication of Water Rights in the Cypress Creek Basin dated June 9, 1986 a right was recognized under Permit 2231AB authorizing the Franklin County Water District and the Texas Water Development Board to appropriate waters of the State of Texas as set forth below;

WHEREAS, by an amendment to Permit 2231AB issued on July 27, 1983, the Texas Water Commission authorized an increase in the maximum diversion rate from 40.4 cfs (18,100 gpm) to 161.5 cfs (72,352 gpm);

WHEREAS, by an amendment to Permit 2231ABC issued on June 13, 1986, the Texas Water Commission authorized the conversion of 6138 acre-feet of water from industrial purposes to municipal purposes of which 5000 acre-feet is authorized for transbasin transfer into the Sabine River Basin and 2185 acre-feet into the Sulphur River Basin;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Cypress Creek Basin is issued to the Franklin County Water District and the Texas Water Development Board, subject to the following terms and conditions:

1. IMPOUNDMENT

Owners are authorized to maintain an existing dam and reservoir on Cypress Creek (Lake Cypress Springs) and impound therein not to exceed 72,800 acre-feet of water. The dam is located in the

Paticaspio Flores Survey, Abstract 172 and the William McNe Survey, Abstract 335, Franklin County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 9300 acre-feet of water per annum from the aforesaid reservoir for municipal purposes, of which 5000 acre-feet of water may be diverted into the Sabine River Basin and 2185 acre-feet into the Sulphur River Basin.

B. Owner is authorized to divert and use not to exceed 5940 acre-feet of water per annum from the aforesaid reservoir for industrial purposes.

C. Owner is authorized to divert and use not to exceed 60 acre-feet of water per annum from the aforesaid reservoir for irrigation purposes.

D. Owner is authorized to use the impounded water of the aforesaid reservoir for recreation purposes.

3. DIVERSION

A. Location:
At the perimeter of the aforesaid reservoir and through the outlet structure of the dam.

B. Maximum combined rate: 160.78 cfs (72,350 gpm).

4. PRIORITY

A. The time priority of owners' right is January 31, 1966 for the aforesaid reservoir, the transbasin diversion of 1000 acre-feet of water per annum for municipal purposes for the City of Mount Vernon at a diversion rate not to exceed 27.00 cfs (12,150 gpm).

B. The time priority of owners' right is July 20, 1970 for the diversion and use of 60 acre-feet of water per annum for irrigation purposes; 8300 acre-feet for municipal purposes, of which 4173 acre-feet is relating to transbasin diversion and and 5940 acre-feet for industrial purposes.

C. The time priority of owners' right is October 6, 1980 for the increase of the diversion rate from 27.0 cfs (12,100 gpm) to 40.4 cfs (18,100 gpm) and to transfer not to exceed 2012 acre-feet of water diverted for municipal use from the Cypress Creek Basin to the Sabine River Basin.

D. The time priority of owners' right is April 18, 1983 for the increase of the diversion rate from 40.4 cfs (18,100 gpm) to 161.5 cfs 72,352 gpm).

5. SPECIAL CONDITIONS

A. Owners shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

B. Owners are authorized to use the bed and banks of Cypress Creek, below the aforesaid dam, to convey and deliver water to be appropriated here under to downstream diversion points.

C. Owners shall maintain a continuous content measuring station.

D. Owners rights hereunder or subject to an agreement for reservoir operations on Cypress Creek between the Texas Water Development Board; the Titus County Fresh Water Supply District No. 1; the Franklin County Water District; the Northeast Texas Municipal Water District and the Lone Star Steel Company, dated January 1, 1973 and to subsequent amendments to that agreement or basin operation orders issued by the Commission.

The locations of pertinent features related to this certificate are shown on Page 1 of the Cypress Creek Basin Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Water Commission, Austin, Texas and the Franklin County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 188th Judicial District Court of Gregg County, Texas, in Cause No. 86-257-A, In Re: The Adjudication of Water Rights in the Cypress Creek Basin dated June 9, 1986 and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Cypress Creek Basin.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Red River Compact.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ Paul Hopkins
Paul Hopkins, Chairman

DATE ISSUED:

OCT 13 1985
ATTEST:

/s/ Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

Guadalupe-Blanco River Authority

Canyon Reservoir

Water Right

AMENDMENT TO
CERTIFICATE OF ADJUDICATION

CERTIFICATE NO. 18-2074C			TYPE: AMENDMENT
Name:	Guadalupe-Blanco River Authority	Address:	933 East Court Street Seguin, Texas 78155
Filed:	January 10, 1990	Granted:	January 31, 1990
Purposes:	Municipal, Irrigation and Recreation	County:	Comal
Watercourse:	Guadalupe River	Watershed:	Guadalupe River Basin

WHEREAS, Certificate of Adjudication No. 18-2074B, issued August 12, 1988, includes authorization in Paragraph 2.A.(1), for the Guadalupe-Blanco River Authority to divert and use from Canyon Reservoir not to exceed 35,125 acre-feet of water per annum for municipal purposes with a provision that the authority can use, as a part of the municipal water authorized, not to exceed 1500 acre-feet of water per annum for irrigation purposes and 1500 acre-feet of water per annum for recreational purposes; and

WHEREAS, SPECIAL CONDITION 5.C. of the amended certificate indicates that the above-referenced authorization to use municipal water for irrigation and recreational purposes is to expire and become null and void on December 31, 1989; and

WHEREAS, applicant has requested an amendment to Certificate No. 18-2074, as amended, to extend the term allowing use of municipal water for irrigation and recreational purposes until December 31, 2000; and

WHEREAS, the Texas Water Commission finds that jurisdiction over the application is established; and

WHEREAS, no person protested the granting of this application; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Water Commission in issuing this amendment.

NOW, THEREFORE, this amendment to Certificate No. 18-2074, as amended, is issued to Guadalupe-Blanco River Authority, subject to the following provisions:

In Special Condition 5.C. of Certificate No. 18-2074B, the expiration date is amended to read December 31, 2000.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate No. 18-2074, as amended, except as specifically amended herein.

This amendment is issued subject to all superior and senior water rights in the Guadalupe River Basin.

Certificate owner agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Water Commission and to the right of continuing supervision of State water resources exercised by the Commission.

TEXAS WATER COMMISSION

B. J. Wynne, III, Chairman

DATE ISSUED: February 26, 1990

ATTEST:

Brenda W. Foster, Chief Clerk

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 18-2074B

OWNER: Guadalupe-Blanco River Authority
933 E. Court St.
Seguin, Texas 78155

COUNTY: Comal

PRIORITY DATES: March 19, 1956; October 14, 1980; February 22, 1983 and November 15, 1985

WATERCOURSE: Guadalupe River

BASIN: Guadalupe River

WHEREAS, the Texas Water Commission, on October 26, 1981, issued Certificate of Adjudication No. 18-2074A to the Guadalupe-Blanco River Authority reflecting the Authority's rights under Permit 1886 as of December 6, 1973, as recognized by final judgment and decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979;

WHEREAS, by final decree of the 267th Judicial District Court of Victoria County, in Cause No. 84-2-32534C-3, In Re: The Exceptions of Guadalupe-Blanco River Authority and Central Power and Light Company to the Adjudication of Water Rights of the Lower Guadalupe River Segment, Guadalupe River Basin, and a portion of the Lavaca-Guadalupe Coastal Basin, dated September 8, 1986, further rights were recognized the Authority under Permit 1886ABC as of February 17, 1981, the date the record was closed on the claim submitted by the Authority in that adjudication;

WHEREAS, the Commission has issued the Authority amendments to Permit 1886ABC (Permits 1886D-F) after February 17, 1981;

NOW, THEREFORE, this Amendment to Certificate of Adjudication 18-2074A is issued to Guadalupe-Blanco River Authority to reflect the Authority's rights under Permit 1886ABCDEF, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized the right to impound 740,900 acre-feet of water in an existing dam and reservoir on the Guadalupe River (Canyon Reservoir), which is owned by the United States of America and operated by the U.S. Corp of Engineers. The conservation storage capacity of Canyon Reservoir is 386,200 acre-feet of water. Point on the dam at the center of the stream bears N 04°15'E, 8241 feet from the east corner of the William Smith Survey, Abstract 542, Comal County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed an average of 50,000 acre-feet of water per annum from the water impounded in the conservation storage space in Canyon Reservoir in accordance with the following authorizations:

(1) Owner is authorized to divert and use not to exceed 35,125 acre-feet of water per annum for municipal use; provided, however, that owner is authorized to use from and out of such amount as additional purposes of use not to exceed 1,500 acre-feet of water per annum for irrigation use and 1,500 acre-feet of water for recreational use.

(2) Owner is authorized to divert and use not to exceed 100 acre-feet of water per annum for domestic use.

(3) Owner is authorized to divert and use for industrial use not to exceed:

(a) an average of 6,000 acre-feet of water per annum in connection with the generation of electrical power; provided, however, that 18,900 acre-feet may be so used during any year but not to exceed 30,000 acre-feet during any five consecutive calendar year period;

(b) an additional 6,075 acre-feet of water per annum; and

(c) an additional 2,700 acre-feet of water per annum.

B. Pursuant to the authorizations set forth in Paragraph 2A, above, owner is authorized to divert and use not to exceed 62,900 acre-feet of water in any year from Canyon Reservoir, provided that diversions may not exceed an average of 50,000 acre-feet per year over any five consecutive calendar year period.

C. Owner is authorized to transfer 7,649 acre-feet of water per annum for industrial purposes from the Guadalupe River Basin for use in that portion of the Lavaca-Guadalupe Coastal Basin which lies within the Authority's boundaries as such boundaries are defined by statute.

D. Owner is authorized to transfer 900 acre-feet of water per annum for municipal purposes from the Guadalupe River Basin for use in that portion of the San Antonio River Basin which lies within the Authority's boundaries as such boundaries are defined by statute.

3. DIVERSION

A. Location:

(1) On the perimeter of the aforesaid Canyon Reservoir.

(2) Releases through the dam for use downstream.

B. Maximum rate: Unspecified.

4. PRIORITIES

A. The time priority of owner's right to impound water in Canyon Reservoir and to divert and use water therefrom for all authorized purposes of use is March 19, 1956.

B. The time priorities of owner's right to transfer the 7,649 acre-feet of water per annum for industrial purposes from the Guadalupe River Basin for use in the Lavaca-Guadalupe Coastal Basin, as set forth in Paragraph 2C, above, are as follows:

(1) October 14, 1980, as to 6,075 acre-feet of water per year;

(2) February 22, 1983, as to 374 acre-feet of water per year; and

(3) November 15, 1985, as to 1,200 acre-feet of water per year.

C. The time priority of owner's right to transfer the 900 acre-feet of water per annum for municipal purposes from the Guadalupe River Basin for use in the San Antonio River Basin, as set forth in Paragraph 2D, above, is November 15, 1985.

5. SPECIAL CONDITIONS

A. Owner is authorized to use the bed and banks of the Guadalupe River to convey water released from Canyon Reservoir for all authorized purposes of use.

B. Owner shall maintain the existing outlet in the dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

C. The authorization to use the 1,500 acre-feet of water per annum for irrigation purposes and 1,500 acre-feet of water per annum for recreational use, as set forth in Paragraph 2A(1), above, shall expire and become null and void on December 31, 1989, after which date owner is authorized to use such 3,000 acre-feet of water per annum only for municipal use.

h The locations of pertinent features related to this certificate are shown on Page 1 of the Lower Guadalupe River Segment Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This amended certificate of adjudication is issued subject to all terms, conditions and provisions in the final judgment and decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CA-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, and in the final judgment and decree of the 267th Judicial District Court of Victoria County, Texas, in Cause No. 84-2-32534C-3, In Re: The Exceptions of Guadalupe-Blanco River Authority and Central Power and Light Company to the Adjudication of Water Rights of the Lower Guadalupe River Segment, Guadalupe River Basin, and a portion of the Lavaca-Guadalupe Coastal Basin, dated September 6, 1986, and supersedes all rights of the owner asserted in these causes.

This amended certificate of adjudication is issued subject to senior and superior water rights in the Guadalupe River Basin.

This amended certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ B.J. Wynne, III
B. J. Wynne, III, Chairman

DATE ISSUED:

AUG 12 1988
ATTEST:

/s/ Karen A. Phillips
Karen Phillips, Chief Clerk

MODIFIED
CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 18-2074A OWNER: Guadalupe-Blanco River Authority
P. O. Box 271
Seguin, TX 78155

COUNTY: Comal PRIORITY DATE: March 19, 1956

WATERCOURSE: Guadalupe River BASIN: Guadalupe River

WHEREAS, by final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, a right was recognized under Permit 1886 authorizing Guadalupe-Blanco River Authority to appropriate waters of the State of Texas as set forth below;

WHEREAS, the adjudication hearing record on the Guadalupe-Blanco River Authority's claim under Permit 1886 was closed on December 6, 1973;

WHEREAS, Certificate of Adjudication No. 18-2074, issued by the Texas Water Commission on July 17, 1981, reflects the status of Permit No. 1886 as it has been amended subsequent to December 6, 1973;

WHEREAS, Certificate of Adjudication No. 18-2074 has been filed and recorded by the County Clerk of Comal County, Texas, in Vol. 2, Pages 39 and 40, of the Water Rights Records of Comal County;

WHEREAS, by motion filed with the Texas Water Commission on August 3, 1981, the Guadalupe-Blanco River Authority requested that Certificate of Adjudication No. 18-2074 be modified to eliminate any reference to any amendments to Permit No. 1886 granted by the Commission subsequent to December 6, 1973, the date the hearing record for Permit No. 1886 in the Upper Guadalupe River Segment adjudication was closed;

NOW, THEREFORE, Certificate of Adjudication No. 18-2074, recorded in Vol. 2, Pages 39 and 40, of the Water Rights Records of Comal County, is withdrawn and this Certificate of Adjudication No. 18-2074A replacing Certificate of Adjudication No. 18-2074 is issued to the Guadalupe-Blanco River Authority subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is recognized the right to maintain a dam and reservoir, Canyon Reservoir, on the Guadalupe River and impound therein not to exceed 740,900 acre-feet of water. The conservation storage capacity of the Canyon Reservoir is 386,200 acre-feet of water. Point on the dam at the center of the stream is N 4°15'E, 8241 feet from the east corner of the William Smith Survey, Abstract 542, Comal County, Texas.

2. USE

Owner is authorized to divert and use not to exceed 50,000 acre-feet of water per annum from the water impounded in the conservation storage space of the Canyon Reservoir on the Guadalupe River for municipal purposes.

3. DIVERSION

In accordance with the terms of Permit No. 1886.

4. PRIORITY

The time priority of owner's right is March 19, 1956.

5. SPECIAL CONDITIONS

A. Owner is authorized to use the bed and banks of the Guadalupe River to convey water released from the conservation storage of Canyon Reservoir to downstream diversion points on the Guadalupe River.

B. Owner shall maintain the existing outlet in the dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

The locations of pertinent features related to this certificate are shown on Page 12 of the Guadalupe River Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Department of Water Resources and the office of the County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, and supersedes all rights of the owner asserted in that cuase.

This certificate of adjudication reflects the status of Permit No. 1886 as of December 6, 1973, the date that the record on owner's claim in this matter was closed. Nothing herein shall adversely affect any further rights of owner under Permit No. 1886 acquired since that date pursuant to amendments to said permit or otherwise.

This certificate of adjudication is issued subject to senior and superior water rights in the Guadalupe River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Department of Water Resources and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Felix McDonald, Chairman

DATE ISSUED:

October 26, 1981

Lee B. M. Biggart, Commissioner

ATTEST:

Dorsey B. Hardeman, Commissioner

Mary Ann Hefner, Chief Clerk

7-17-81

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 18-2074

OWNER: Guadalupe-Blanco River Authority
P. O. Box 271
Seguin, TX 78155

COUNTY: Comal

PRIORITY DATES: March 19, 1956 and October 14, 1980

WATERCOURSE: Guadalupe River

BASIN: Guadalupe River

WHEREAS, by final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, a right was recognized under Permit 1886 authorizing Guadalupe-Blanco River Authority to appropriate waters of the State of Texas as set forth below;

WHEREAS, by amendment dated May 13, 1977, issued to Guadalupe-Blanco River Authority to amend Permit No. 1886, use of 50,000 acre-feet of water per annum for municipal use was changed to use of 44,000 acre-feet of water per annum for municipal use and 6000 acre-feet of water per annum for industrial use;

WHEREAS, by amendment dated November 12, 1979, issued to Guadalupe-Blanco River Authority, Permit 1886A was amended as follows;

Guadalupe-Blanco River Authority was authorized to divert and beneficially use not to exceed an average of 50,000 acre-feet of water per annum or so much thereof as may be necessary in accordance with the following authorizations:

(1) 43,716 acre-feet per annum for municipal use; provided, however, that owner is authorized to use from and out of such amount for additional purposes of use not to exceed 1500 acre-feet per annum for irrigation use and 500 acre-feet per annum for recreational use, with the authorization to divert and use water for irrigation and recreational purposes expiring on December 31, 1989.

(2) 100 acre-feet per annum for domestic use;

(3) An average of 6000 acre-feet of water per annum for electrical power generation purposes but not to exceed 30,000 acre-feet of water during any 5 consecutive calendar years, and further, not to exceed 18,900 acre-feet during any one year;

(4) 184 acre-feet of water per annum for other industrial use;

WHEREAS, by amendment dated January 26, 1981, issued to Guadalupe-Blanco River Authority, Permit 1886B was amended as follows;

Guadalupe-Blanco River Authority was authorized to appropriate, divert and beneficially use not to exceed an average of 50,000 acre-feet of water per annum or so much thereof as may be necessary in accordance with the following authorizations;

(1) 37,641 per annum for municipal use; provided, however, that owner is authorized to use from and out of such amount for additional purposes of use not to exceed 1500 acre-feet per annum for irrigation use and 500 acre-feet per annum for recreational use with the authorization to divert and use water for irrigation and recreational purposes expiring on December 31, 1989;

(2) 100 acre-feet per annum for domestic use;

(3) an average of 6000 acre-feet per annum in connection with the generation of electrical power; provided, however, that 18,900 acre-feet may be so used during any year but not to exceed 30,000 acre-feet during any five consecutive calendar year period;

(4) 6075 acre-feet per annum for industrial purposes, said water to be transferred from the Guadalupe River Basin to the portion of the Lavaca-Guadalupe Coastal Basin that lies within the boundaries of the Guadalupe-Blanco River Authority, with said interbasin transfer of water having a time priority of October 14, 1980;

(5) 184 acre-feet of water per annum for other industrial purposes within the Guadalupe River Basin.

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Guadalupe River Basin is issued to Guadalupe-Blanco River Authority, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain a dam and reservoir on the Guadalupe River and impound therein not to exceed 740,900 acre-feet of water. Point on the dam at the center of the stream is N 4°15'E, 8241 feet from the east corner of the William Smith Survey, Abstract 542, Comal County, Texas.

2. USE

Owner is authorized to divert and use not to exceed an average of 50,000 acre-feet of water per annum from Canyon Reservoir on the Guadalupe River for the following purposes:

municipal use	-	37,641 acre-feet per annum
irrigation	-	1,500 acre-feet per annum to be deducted from the municipal use authorization
recreation	-	500 acre-feet per annum to be deducted from the municipal use authorization
domestic	-	100 acre-feet per annum
industrial (a) electrical power generation	-	an average of 6000 acre-feet per annum provided that 18,900 acre-feet may be used in any one year but not to exceed 30,000 acre-feet during any five consecutive calendar year period
(b) other use in the Lavaca-Guadalupe Coastal Basin	-	6075 acre-feet per annum
(c) other use in the Guadalupe River Basin	-	184 acre-feet per annum.

3. DIVERSION

By releases into the Guadalupe River from Canyon Reservoir.

4. PRIORITY

The time priority of owner's right is March 19, 1956 as to the right to appropriate, divert and beneficially use an average of 50,000 acre-feet of water per annum, and October 14, 1980 as to the interbasin transfer of water from the Guadalupe River Basin to the Lavaca-Guadalupe Coastal Basin.

5. SPECIAL CONDITIONS

A. Owner is authorized to use the bed and banks of the Guadalupe River to convey water released from conservation storage of Canyon Reservoir for all authorized purposes of use.

B. The authorization to use 1500 acre-feet of water per annum for irrigation and 500 acre-feet of water per annum for recreation shall expire on December 31, 1989, at which time owner will be authorized to use such 2000 acre-feet of water per annum for municipal use only.

C. Owner shall maintain suitable outlets in the dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

D. Owner is authorized to transfer 6075 acre-feet of water per annum for industrial use supplied under Permit No. 1886, as amended, from the Guadalupe River Basin for use in that portion of the Lavaca-Guadalupe Coastal Basin which lies within the boundaries of owner as such boundaries are defined by statute.

The locations of pertinent features related to this certificate are shown on Page 12 of the Guadalupe River Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Department of Water Resources and the office of the County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 37th Judicial District Court of Bexar County, in Cause No. 77-CI-13052, In Re: The Adjudication of Water Rights in the Upper Guadalupe River Segment of the Guadalupe River Basin, dated November 12, 1979, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Guadalupe River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Department of Water Resources and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ Felix McDonald
Felix McDonald, Chairman

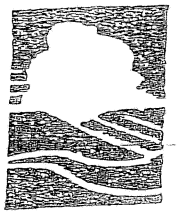
DATE ISSUED:

JUL 17 1981

ATTEST:

/s/ Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

ATTACHMENT 3



A Regulatory Guidance Document for Applications to Divert, Store or Use State Water

(DRAFT)

Texas Natural Resource Conservation Commission
Office of Water Resource Management
March 28, 1994

TABLE 2

TEXAS WATER CODE CHAPTER 11: GRANTING A WATER RIGHT

Section 11.134 of the Water Code provides that the Commission may grant an application for a new or additional appropriation of water only if:

1. *the application meets all necessary requirements;*
2. *unappropriated water is available in the source of supply;*
3. *the water will be beneficially used;*
4. *the use will not impair an existing water right or vested riparian right;*
5. *the use will not be detrimental to the public welfare; and*
6. *the applicant provides evidence that reasonable diligence will be used to avoid waste and achieve water conservation.*

In its consideration of an application for a new or amended water right, the Commission shall also assess the effects, if any, of the issuance of the permit or amendment on:

1. *bays and estuaries (Id. §11.147(b));*
2. *existing instream uses (Id. §11.147(d));*
3. *water quality (Id. §§11.147(d) and 11.150); and*
4. *fish and wildlife habitats (Id. §§11.147(e) and 11.152).*

In addition to the applicable criteria and factors discussed above, the Commission conside certain third party impacts with respect to an application for the interbasin transfer of wate Specifically, the application will not be approved if it would result in the "prejudice of any person property" situated in the basin of origin. Id. §11.085(a). Thus, an interbasin transfer may be allow if existing rights are protected, which is generally done by making the permit subordinate to affect existing rights. Halsell v. Texas Water Commission, 380 S.W. 2d 1 (Tex. Civ. App. - Austin 196 writ ref'd n.r.e.).

Water used in "excess" of what is reasonable is considered a "waste" of water. §297.54. However, normal operating losses of water associated with the storage, dist. treatment, delivery and application of water do not constitute "waste". What is "norm is site-specific to both the climate and engineering infrastructure of a region and water pr The efficient management of water prevents the waste of water. It is the obligation of all right holders to beneficially use water without waste.

A water conservation plan provides evidence that the water will be efficiently mar and not wasted. It also may be used, in place of or in conjunction with, water manage plans, water demand forecasts, and other data, to substantiate the amount of water whi necessary and reasonable for the requested use.

Comment → The uses listed in §11.023 are in a different order than preferences stated Inherent conflict that should be addressed by the Legislature.

The authorized purposes are listed in ~~preferential~~ order (see Table 6), but d determine the priority of the water right. Such priority is determined by time, the dat application was accepted for filing for the water right. The preferential order contain §11.024 ~~§11.023(a)~~ is used only in those instances where there are competing applications for the water. Comment → The applicability of §11.024 will depend to what is Water Management Plan is pending before a Hearing Examiner.

Water may also be appropriated and stored in an aquifer for subsequent recovery an in accordance with the authorized purpose. Such storage is allowable if it can be establi evidence or expert testimony that an unreasonable loss of water will not occur in the st water in the aquifer and that the water can be withdrawn at a later time for a benefi 11.023(e) pursuant to ~~§11.123(e)~~ of the Water Code. For purposes of recharge of the southern po the Edwards Aquifer underlying Kinney, Uvalde, Median, Bexar, Comal, and Hays cou only unappropriated storm and flood water may be used.

Finally, water used for instream uses is also recognized as a beneficial use. 30 §297.1. Instream uses include navigation, recreation, hydropower, fisheries, game prese stock raising, park purposes, aesthetics, water quality protection, aquatic and wildlife ha freshwater inflows to bays and estuaries, and any other instream use recognized by law.

C. Non-Impairment of Existing Water Rights (The "No Injury" Rule)

Statutory Authority

Section 11.134(b)(3)(B) of the Water Code provides that an application may approved if it would "impair" an existing water right or vested riparian right. With resp an application to amend a permit, including, but not limited to, changes in the place

purpose of use, time of use, point of diversion, or rate of diversion, TNRCC must ensure that the change does not impair uses by other water rights holders. This is commonly referred to as the "no injury" rule. Hutchins, The Texas Law of Water Rights (1961) pp 288-291; Skillern, Texas Water Law: Volume I, Ch. 3, pp 79-83 (1991).

Technical Review Criteria and Procedures

In order to prevent such harm to other appropriators, the Commission places restrictions on the amended water right. Tex. Water Code §§11.122 and 11.1351. This may occur if the applicant wishes to change his appropriation to a more consumptive use, move the existing diversion point, or otherwise impose additional legal obligations on other water right holders vis a vis the amended right. Restrictions could typically include the subordination of the amended right to affected water rights through limitations on the time or stream conditions when the amended right may be exercised. Such subordination, however, does not otherwise affect the original priority date of the water right being amended.

The purpose of the rule is to protect vested water rights by restricting changes in water rights to prevent conflict between diverters. An appropriator who invests in a diversion project on the basis of the stream conditions and water rights as they existed when his water right was granted is entitled to the protection of his vested right. Thus, even a junior appropriator can object to a senior appropriator's proposed change to the latter's water right.

Table 6

Beneficial Use of State Water

Authorized purposes of use of State water are identified in §11.023(a) of the Water Code as follows:

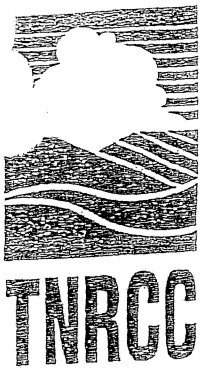
(1) domestic and municipal uses;
(2) industrial uses;
(3) irrigation;
(4) mining and recovery of minerals
(5) hydroelectric power;
(6) navigation;
(7) recreation and pleasure;
(8) stock raising;
(9) public parks;
(10) game preserves; and
(11) any other beneficial use.

The amount of water appropriated for each authorized purpose must be specifically appropriated for that purpose. Tex. Water Code §11.023(e).

D. Public Welfare

Statutory Authority

ATTACHMENT 4



June 1995
RG-141

A Regulatory Guidance Document for Applications To Divert, Store or Use State Water

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

conditions. Floodwater surface-elevation profiles and design-flood delineations of the floodplai shall be considered with the project in place and with a comparable levee or landfill on the opposite side of the stream if such structures do not exist but are plausible.

If the proposed project is found to meet the general criteria, the Commission is informed by the staff of the findings for due consideration of the application. Once the permit is issued, the second step, which involves preparation, evaluation, and approval of the final construction plans and details, is initiated. Detailed construction drawings, geotechnical studies including stability analyses, structural analyses, and specifications are required at this stage. The detail and depth of the supporting documentation will depend on the size and hazard classification of the project. In some cases, an emergency action plan may also be required.

Construction may commence only after approval of the plans and specifications have been obtained by the permittee. Projects impounding more than 1,000 acre-feet of water at normal storage capacity also require written Commission approval prior to deliberate impoundment. As soon as the construction is completed, a certificate of completion from the owner's engineer and recorded as-built drawings must be submitted to close out the project approval process. Future inspections of the project may by scheduled by the Commission staff to monitor the condition, maintenance, operation, and continued safety of the project.

H. Area of Origin Protection (Interbasin Transfer)

Statutory Authority

In addition to the general provisions discussed above regarding Commission review and approval of an application for a new or amended water right, §11.085 of the Texas Water Code provides that any interbasin transfer shall not be "to the prejudice of any person or property" within the basin of origin. In a case in which it interpreted Section 11.085 of the Code, the Texas Supreme Court in City of San Antonio v. Texas Water Commission, 407 S.W.2d 752 Tex. 1966), held that water in excess of that needed for the protection of existing water rights could be transferred after balancing the future benefits and detriments of the two competing basins. If the recipient basin's benefits were greater than the basin of origin's detriments, sufficient prejudice is absent and the transfer is allowable. The state water plan developed by the TWDB delineates river basin boundaries for purposes of this provision. Id. §16.051(b).

Technical Review Criteria and Procedures

An interbasin diversion may cause concern among the general populace living in the river basin from which the water is exported because of its possible far reaching impacts. For instance, a decision to move water from a rural area in one river basin to a city in another basin may: force a decline in agricultural productivity and the farming community built on it in the basin of origin; facilitate more rapid growth in the importing area; prevent future development

of the exporting area; curtail recreational opportunities; make sewage treatment more difficult as diluting streamflows are diminished; deprive the exporting area of groundwater recharge; and cause ecological changes in both areas.

The introduction of consideration of the public interest into the transfer process extends protection to interests beyond the legal interests of water rights holders. However, the extent of that protection for social and economic purposes is uncertain, especially because many "benefits" in both the basins of origin and destination are not, and cannot be, readily quantified and, therefore, easily compared. In any event, the objective is to reach a decision that secures the greatest possible benefit from the public waters for the citizens of the State.

In order to perform the balancing test as provided by City of San Antonio v. Texas Water Commission, the TNRCC requires as a part of the application for a significant and longterm interbasin transfer of water the submission of a water management plan addressing the current supplies, water management, and needs of the proposed users in the basin of destination. The plan should be prepared with broad participation from affected persons and entities in both basins and demonstrate that the recieving basin has examined and/or implemented all reasonable efforts to locally deal with its water needs prior to interbasin transfer, such as implementation of viable water conservation and reuse efforts, efficient system operations, acquisition of existing local supplies, and other such activities. Much of this information may be provided as a part of the water conservation plan and the social, economic, and environmental impact statement submitted with the application in accordance with Commission rules contained in 30 TAC Chapter 288 and §261.21 et seq., respectively. The content and analytical steps for this plan must also conform to those provided under subpart H, Long-term Water Supply Options, below. Enforcement provisions (including termination of the interbasin permit) are designed to help assure performance of the recieving basin applicant.

In many instances, the interbasin transfer of water is not done with the conveyance of the water right itself, but under a water supply contract to sell the water for a limited term. Thus, the interbasin transfer authorization terminates with the term of the underlying contract. Such contracts may provide for "interruptable" supplies of water to the buyer in times of drought in the exporting basin. In order to balance the need of both the exporting and importing basins during a drought period, the contract may contain negotiated percentages of the amount of exported water subject to interruption during drought or other emergency shortages of water occurring simultaneously in both basins. If the drought worsens, the parties may also agree to share any further reductions in supply on a pro rata basis, related to the amount of water remaining in reservoir storage. Since domestic water supplies need to be based upon longterm, reliable sources of supply, such short-term supply contracts are not advisable for this purpose without adequate alternative water supplies.

Commission rules in 30 TAC §295.155 require mailed notice of interbasin transfers to water right claimants or appropriators of record and navigation districts in the basin of origin and to users of record located below the point of introduction in the receiving watershed.

However, application notice requirements in 30 TAC §295.155 do not provide for maile notification of any third parties which may be affected by the transfer.

Finally, it should be noted that a statute prohibiting the state water plan from recommending the interbasin transfer of water if such water will be required for the reasonably foreseeable water supply requirements within the basin of origin during the next ensuing 50-year period, except on a temporary, interim basis, was repealed in 1991 (former sec. 16.052 Tex. Water Code). However, the state constitutional amendment providing that state monies may not be used to finance a project "which contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonable foreseeable future water requirements for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis" remains in effect. Art. III, sec. 49-d, Tex. Const.

I. Long-Term Water Supply Options

Statutory Authority

Section 11.140 of the Water Code provides that a permit may be issued for storage solely for the purpose of optimum development of a reservoir site. The Commission may convert these permits to permits for beneficial use if application to have them converted is made to the Commission. The purpose of this provision is to recognize the limited number of favorable locations for reservoirs and provide that these sites be developed to the maximum benefit feasible.

Suppliers of water for municipal and domestic purposes such as cities, districts, and river authorities desire a high degree of certainty in their ability to meet estimated future water demands. The traditional solution to this problem was to build new reservoirs. However, there are potentially significant economic, social, and environmental costs associated with a major new reservoir. Full appropriation of water and the protection of environmental water needs do not foreclose economic growth or diversity; they simply require careful and orderly management and development of existing supplies as demands change. As a result, local water planners have had to consider first the development of cost-effective and environmentally sensitive strategies to meet future water needs.

This is not to say that the building of new reservoirs will never be acceptable or appropriate. However it is now being recognized that a variety of feasible alternatives to new structural water development projects exist. The integration and implementation of these alternatives first can often defer or avoid construction of some reservoirs. Where appropriate, these alternatives may potentially save ratepayers money and allow more time to make wise water management and planning decisions in the most economical and environmentally sensitive manner.

ATTACHMENT 5

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: Mark Jordan, Director Water Policy Division Date: September 23, 1997

Thru: 9/25 Don Neal, Director, Water Quantity Division
Kariann Sokulsky, Manager, Water Uses & Availability Section

From: Lann Bookout, Water Rights Permitting

Subject: Interbasin Transfer Information

Of the total number of interbasin transfers authorized in existing water rights, about 80, only a handful of the authorizations were granted as amendments to existing rights. In these amendments the Commission either authorized the interbasin transfer with the old priority date or the amendment does not specify or mention a priority in which case the old priority must apply. Exceptions to this are Mackenzie MWA and the City of Clyde rights which were given priority dates of the filing date of the applications to amend the rights.

At least four authorizations, recently granted, allow the transfer w/the same priority date as the original right.

1. Water Right No. 4797-A, Sulphur River MWD, interbasin transfer from the Sulphur River Basin to the Trinity River Basin [from Cooper Lake to Lake Lavon]. Original permit dates back to 1965. The right was amended in 1992 to add the authorization for the interbasin transfer. This 1992 amendment didn't specify a priority for the transbasin water, so the 1965 date is assumed.

2. Water Right No. 4590-A, North East Texas MWD, transfer from the Cypress River Basin to the Sabine River Basin [Lake O' the Pines, Brandy Branch Lake]. This 1995 amendment specified that the interbasin transfer water has a 1957 (the original) priority date.

3. Water Right No. 5271, San Jacinto River Authority, interbasin transfer from the Trinity River Basin water to the San Jacinto and the Trinity-San Jacinto Coastal Basins. This right was amended in 1995 to add the authorization for the transfer. This 1995 amendment gives the interbasin transfer a 1917 (the original) priority date.

4. Water Right No. 2095-A, LNRA and the TWDB, interbasin transfer from the Lavaca River Basin to the City of Corpus Christi. This 1996 amendment gives the interbasin transfer a 1972 (the Certificates original date) priority.

5. Water Right No. 2410, North Texas MWD, transfer from the Trinity River Basin to the Sabine River Basin [Lake Lavon, to Royse City & others]. Type of water: Treated. This right does not mention, in any of the several amendments, the interbasin transfer. City of Royse is in the Sabine River Basin.

6. Water Right No. 1660-B, City of Clyde, interbasin transfer from Brazos River Basin to Lake Clyde in the Colorado River Basin. This 1988 amendment (which was uncontested) specifically gives the interbasin transfer a 1985 priority (the original priority is 1965).

7. Certificate No. 5211 (originally Permit No. 2297), Mackenzie Municipal Water Authority, interbasin transfer from the Red River to the Brazos. The original permit was issued in 1967 to allow use of 4000 acre-feet of water for municipal use and 1200 acre-feet for industrial use from the Red River Basin. In 1982 the Authority applied for an amendment to its 1967 permit to transfer a portion of the water out of the Red River Basin and into the Brazos Basin. The application to amend was not protested; this is indicated in the 1982 amended permit. The 1982 amendment allowed the use of not to exceed 50% of permitted quantities of water to be used within the Mackenzie service area in the Brazos River Basin. The amendment for the interbasin transfer use was given a 1982 priority. The Authority was involved in the State's adjudication at this time; the amendment to the permit had to be added to the final determinations as an addendum; it was incorporated into Certificate 5211 which recognized that a portion of the water could be transferred to the Brazos transbasin authorization and that water, when used outside the basin, retains the 1982 priority.

8. Certificate No. 04-4560 (Franklin Co Water Dist), transfer of water from Lake Cypress Springs in the Cypress River Basin to the Sulphur and Sabine River Basins. The history of this Certificate was difficult to trace. The original right is based on Permit No. 2231 issued in 1966 and apparently included transbasin diversion for some water. In 1970 the permit was amended to increase the appropriative amounts of water and allow some of the newly appropriated water to be transferred out of basin. In 1980, the permit was again amended to allow more of the permitted water to be transferred out of basin (this 1980 amendment did not result in an increase in the total amount of water authorized). In 1986, the permit was recognized as Certificate No. 4560 and allowing for the diversion of up to 15,300 acre-feet of water of which a total of 7,185 could be transferred out of basin. Of the 7,185 acre-feet of water authorized for use out of the basin, 1000 acre-feet has a priority date of 1966 (the original permit), 4,173 acre-feet of water has a priority date of 1970, and 2,012 acre-feet has a priority date of 1980; however, this latter amount of water has a priority date of 1970 if it is used within the basin of origin. The priority date of 1970 is associated with the 1970 application seeking additional amounts of water, and the 1980 priority date is associated with the application seeking an increase in the diversion rate as well as authorization to increase the amount of water permitted in 1970 for use out of the basin. A subsequent amendment to the Certificate in 1990 did not specifically ask for transbasin diversion authorization. The amendment asked to change some purposes of use for industrial and irrigation water which did not appear to be associated with transbasin authorization.

In summary, seven amendments specifically seeking and granting interbasin transfer authorization were identified. Of these, four, those most recently granted, protected the priority date of the original right. Three others (City of Clyde, Mackenzie, and Franklin) were assigned a new priority date using the filing date of the application to amend; the amendments to Clyde and Mackenzie did

not involve additional appropriations of water but changed the conditions and terms of use for the original permitted water. The 1970 amendment to the Franklin permit did seek an additional appropriation of water as well as additional interbasin transfer authorization. The 1980 amendment for additional interbasin transfer authorization did not allow the priority date of the original 1970 water to be retained but used the filing date of the 1980 application. It may be relevant in determining agency policy on this issue that the four most recent transfers, which protected the original priority dates, occurred after adjudication, whereas the three amendments which did not protect the original priority dates occured prior to or during adjudication in the applicable river basins.

Staff also reviewed the file for the North Texas MWD right but could not identify any amendment to this right which authorized additional interbasin transfers.

cc: Kenneth L. Petersen, Jr., Deputy Director, Office of Water Resource Management
Margaret Hoffman, Senior Water Rights Attorney, Legal Services Division

F:\MEMO.IBT

ATTACHMENT 6

5734

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 05-4670

OWNER: Sabine River Authority of Texas
P. O. Box 579
Orange, Texas 77631-0579

COUNTIES: Hunt, Rains and Van Zandt

PRIORITY DATES: September 12, 1955; August 13, 1985 and May 21, 1986

WATERCOURSE: Sabine River

BASIN: Sabine River

WHEREAS, by final decree of the 188th Judicial District Court of Gregg County, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, a right was recognized under Permit 1792B authorizing the Sabine River Authority of Texas to appropriate waters of the State of Texas as set forth below:

WHEREAS, by an amendment to Permit 1792B, issued on September 29, 1986, the Texas Water Commission extended the time limitation until July 1, 1991 for the use of 3500 acre-feet of water per annum for industrial purposes;

WHEREAS, by an amendment to Permit 1792B, issued on May 28, 1987, the Texas Water Commission authorized the Sabine River Authority of Texas the right to: (1) increase the impoundment in Lake Tawakoni from 926,000 acre-feet of water to a maximum of 927,400 acre-feet of water; (2) increase to amount of water used for municipal purposes to 238,100 acre-feet of water; (3) to operate Lake Tawakoni and Lake Fork Reservoirs on a joint use basis; and (4) to transfer from the Sabine River Basin not to exceed 227,675 acre-feet of water per annum to the Trinity River Basin and not to exceed 8396 acre-feet of water per annum to the Sulphur River Basin;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Sabine River Basin is issued to Sabine River Authority of Texas, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and reservoir on the Sabine River (Lake Tawakoni) and impound therein not to exceed 927,440 acre-feet of water. The dam is located in the N. G. Crettenden Survey, Abstract 33; the A. H. Lanier Survey, Abstract 135; the J. Tollett Survey, Abstract 230 and the J. Anderson Survey, Abstract 5, Rains County and the J. Anderson Survey, Abstract 31; the T. W. Anderson Survey, Abstract 14; the J. H. Terry Survey, Abstract 851 and the W. Hatcher Survey, Abstract 377, Van Zandt County, Texas.

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2. USE

A. Owner is authorized to divert and use not to exceed 238,100 acre-feet of water per annum from the aforesaid reservoir for municipal purposes.

B. Owner is also authorized to divert and use not to exceed 3500 acre-feet of water per annum of the municipal authorization from the aforesaid reservoir for industrial purposes.

C. The Sabine River Authority of Texas and the City of Dallas are authorized to operate Lake Tawakoni and Lake Fork Reservoir on a joint use basis. As used herein, the term "Joint Use Basis" shall mean that method of operation of the two reservoirs by which either party may sell, deliver or withdraw from one reservoir water which has been authorized to be diverted from either reservoir regardless of whether such party has the physical means to transport water from one reservoir to the other, subject to the special conditions contained herein.

3. DIVERSION

A. Location:
At any point on the perimeter of the aforesaid reservoir.

B. Maximum combined rate: 600.00 cfs (270,000 gpm).

4. PRIORITY

A. The time priority of owner's right is September 12, 1955 for the impoundment of 926,000 acre-feet of water in Lake Tawakoni; the diversion and use of 230,750 acre-feet of water for municipal purposes and the transbasin diversion of 207,675 acre-feet of water.

B. The time priority of owner's right is August 13, 1985 for the impoundment of the remaining 1440 acre-feet of water and the diversion and use of the remaining 7350 acre-feet of water for municipal purposes.

C. The time priority of owner's right is May 21, 1986 for the transbasin diversion and use of an additional 28,396 acre-feet of water.

5. SPECIAL CONDITIONS

A. Owner shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that owner is not entitled to divert or impound.

B. The authorization to use 3500 acre-feet of water per annum for industrial purposes shall expire on July 1, 1991, after which date the use of said water shall revert to municipal use.

C. The Sabine River Authority of Texas shall not withdraw from Lake Tawakoni more than: (1) 47,620 acre-feet of water per annum, plus (2) any water transported by the Authority from Lake Fork Reservoir to Lake Tawakoni by means of pipeline, canal or otherwise.

D. The City of Dallas shall not withdraw from Lake Tawakoni more than: (1) 190,480 acre-feet of water per annum, plus (2) any water transported by the City of Dallas from Lake Fork Reservoir to Lake Tawakoni by means of pipeline, canal or otherwise.

E. No customer of the Authority shall have the right or entitlement to any portion of the City of Dallas' water in Lake Tawakoni or Lake Fork Reservoir.

F. Owner is authorized to transfer from the Sabine River Basin not to exceed 227,675 acre-feet of water per annum to the Trinity River Basin and not to exceed 8396 acre-feet of water per annum to the Sulphur River for municipal purposes.

G. The authorization to operate Lake Tawakoni and Lake Fork Reservoir on a joint use basis does not authorize additional interbasin transfers of water.

The locations of pertinent features related to this certificate are shown on Page 2 of the Upper Sabine River Segment Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 188th Judicial District Court of Gregg County, Texas, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Sabine River Compact.

Certificate of Adjudication 05-4670

This certificate of adjudication is issued subject to senior and superior water rights in the Sabine River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Paul Hopkins

Paul Hopkins, Chairman

DATE ISSUED

MAY 2 1988

ATTEST:

Karen A. Phillips

Karen A. Phillips, Chief Clerk

VOL 105 PAGE 289

FILED FOR RECORD AT 9:00 O'CLOCK A M June 20, 1988 PEGGY P. HAMILTON
COUNTY CLERK, HUNT COUNTY, TEXAS - BY V. Shasp DEPUTY.

CERTIFICATE OF ADJUDICATION NO. 05-4

Date Recorded: 6-20-88

Volume 105 Page 286

of the Real Property records

Uvalde County, Texas

Jimmie D Hamilton
County Clerk
By N. Sharp, deputy

VOL 1122 PAGE 867

CERTIFICATE OF ADJUDICATION

063755

CERTIFICATE OF ADJUDICATION: 05-4669

OWNER: Sabine River Authority of Texas
P. O. Box 579
Orange, Texas 77631-0579

COUNTIES: Wood and Rains

PRIORITY DATES: June 26, 1974; February 28, 1983 and August 13, 1985

WATERCOURSE: Lake Fork Creek, tributary of the Sabine River

BASIN: Sabine River

WHEREAS, by final decree of the 188th Judicial District Court of Gregg County, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, a right was recognized under Permit 2948 authorizing the Sabine River Authority of Texas to appropriate waters of the State of Texas as set forth below:

WHEREAS, by an amendment to Permit 2948, issued on August 22, 1983, the Texas Water Commission authorized the Sabine River Authority of Texas to divert and use not to exceed: (1) 24,940 acre-feet of water per annum for municipal purposes within the Sabine River Basin; (2) the transbasin diversion of 120,000 acre-feet of water to the Trinity River Basin for use by the City of Dallas; (3) 20,000 acre-feet of water per annum for industrial purposes; and (4) a diversion rate of 334.4 cfs (150,000 gpm) for water sold to the City of Dallas pursuant to a contract;

WHEREAS, by an amendment to Permit 2948A, issued on May 28, 1987, the Texas Water Commission authorized a change in the diversion and use of water as follows: (1) 36,800 acre-feet of water per annum for municipal purposes within the Sabine River Basin; (2) the use of the bed and banks of Lake Fork Creek and Sabine River to transport water to downstream diversion points; (3) 19,500 acre-feet of water per annum for industrial purposes within the Sabine River Basin; (4) 131,860 acre-feet of water per annum for municipal purposes by the City of Dallas, of which 120,000 acre-feet may be used in the Trinity River Basin; (5) authorized the Authority and the City of Dallas to operate Lake Fork and Lake Tawakoni Reservoirs on a joint use basis; and (6) a diversion rate of 600 cfs (269,300 gpm);

WHEREAS, by an amendment to Permit 2948B, issued on November 2, 1987, the Texas Water Commission authorized a change in the amount of water to be diverted from Lake Fork Reservoir for municipal purposes within the Sabine River Basin from 36,800 acre-feet per annum to 37,300 acre-feet of water per annum;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Sabine River Basin is issued to Sabine River Authority of Texas, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and reservoir on Lake Fork Creek (Lake Fork Reservoir) and impound therein not to exceed 675,819 acre-feet of water. The dam is located in the J. Barfield Survey, Abstract 77; the F. S. Chaney Survey, Abstract 111; the J. J. Gholson Survey, Abstract 246; the G. W. Matthews Survey, Abstract 412 and J. M. Swisher Survey, Abstract 553, Wood County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 37,300 acre-feet of water per annum from the aforesaid reservoir for municipal purposes within the Sabine River Basin. This authorization is inclusive of the 20,000 acre-feet of water per annum which the Sabine River Authority agreed to provide to the City of Longview, Texas, in that "Water Supply Agreement" of March 5, 1975.

B. Owner is authorized to divert and use not to exceed 131,860 acre-feet of water per annum from the aforesaid reservoir for municipal purposes by the City of Dallas; however, not to exceed 120,000 acre-feet of water per annum may be transferred to the Trinity River Basin. This authorization is specifically made subject to the option of Texas Utilities Electric Company to purchase up to 17,000 acre-feet of water per annum for industrial purposes; said water to be purchased from the City of Dallas pursuant to that certain contract entitled "First Supplement to Water Supply Contract and Conveyance" dated July 30, 1986.

Upon the occurrence of the contingency set out above, the Sabine River Authority of Texas shall promptly notify the Executive Director in writing of such occurrence and shall promptly file the appropriate contract in accordance with special condition contained herein and the authorization for diversion and municipal use by the City of Dallas, set out above, shall be correspondingly reduced, while the appropriate purchaser (Texas Utilities Electric Company) is hereby granted the appropriate industrial authorization.

C. Owner is authorized to divert and use not to exceed 19,500 acre-feet of water per annum from the aforesaid reservoir for industrial purposes within the Sabine River Basin by Texas Utilities Electric Company. Furthermore, the Texas Utilities

Electric Company agrees to release and relinquish to the Sabine River Authority up to 7500 acre-feet of water per year for sale by the Authority for municipal use in the Sabine River Basin. Upon the occurrence of such release, the Authority shall promptly notify the Executive Director in writing of such release, and the above authorization for diversion and industrial use by the Texas Utilities Electric Company shall be correspondingly reduced and the Sabine River Authority shall be recognized the appropriate authorization for diversion and municipal use.

D. The Sabine River Authority of Texas and the City of Dallas are authorized to operate Lake Fork and Lake Tawakoni reservoirs on a joint use basis. As used herein, the term "Joint Use Basis" shall mean that method of operation of the two reservoirs by which either party may sell, deliver or withdraw from one reservoir water which has been authorized to be diverted from either reservoir regardless of whether such party has the physical means to transport water from one reservoir to the other, subject to special conditions contained herein.

3. DIVERSION

A. Location:
At any point on the perimeter of the aforesaid Lake Fork Reservoir.

B. Maximum rate: 600.00 cfs (270,000 gpm).

4. PRIORITY

A. The time priority of owner's right is June 26, 1974 for the impoundment of water in the aforesaid reservoir and the diversion and use of 164,940 acre-feet of water.

B. The time priority of owner's right is February 28, 1983 for the transbasin diversion of 120,000 acre-feet of water from the Sabine River Basin to the Trinity River Basin.

C. The time priority of owner's right is August 13, 1985 for the diversion and use of the remaining 23,720 acre-feet of water.

5. SPECIAL CONDITIONS

A. Owner will provide the facilities necessary to pass water through the dam at all times. To provide for downstream domestic, livestock, and natural streamline needs, owner will make sufficient releases from the reservoir in a manner approved by the Commission to maintain a minimum flow of 2.00

cfs at the USGS streamflow gaging station at State Highway 37, 5.0 miles downstream from the dam.

B. Owner will install and maintain a continuous lake-level measuring station and maintain the following records:

(1) Reservoir content;

(2) Discharges through Lake Fork Creek Dam.

All records will be compiled monthly and reported to the Commission annually and at other times as required.

C. Owner shall pass its proportional part of water required to maintain a minimum flow of the Sabine River at stateline in accordance with the Sabine River Compact.

D. Owner is authorized to transfer not to exceed 120,000 acre-feet of water per annum from Lake Fork Reservoir in the Sabine River Basin to the Trinity River Basin for municipal use by the City of Dallas. Water transferred to the Trinity River Basin under this authorization may be transported directly to the City of Dallas or may be transported to Lake Tawakoni in the Sabine River Basin and/or Lake Ray Hubbard in the Trinity River Basin for storage and subsequent use by the City of Dallas;

E. All of the contingent authorizations set out above are expressly conditioned on the Sabine River Authority notifying the Texas Water Commission in writing on the exercise of contractual options by the water purchaser and on the compliance by owner with the provisions of 31 TAC Section 297.101 - 297.108 of Texas Water Commission Rules. Such authorizations shall become null and void upon termination of the contract or contracts and, thereafter, owner shall be authorized to make such use of water hereunder as if such contingent authorizations had not occurred.

F. The Sabine River Authority of Texas shall not withdraw from Lake Fork Reservoir more than: (1) 56,800 acre-feet of water per annum, plus (2) any water transported to Lake Fork reservoir from Lake Tawakoni by means of pipeline, canal or otherwise.

G. The City of Dallas shall not withdraw from Lake Fork Reservoir more than: (1) 131,860 acre-feet of water per annum, plus (2) any water transported by the City of Dallas from Lake Tawakoni to Lake Fork Reservoir by means of piepline, canal or otherwise.

H. The authorization to operate Lake Tawakoni and Lake Fork Reservoirs on a joint use basis does not authorize additional interbasin transfers of water.

I. No customer of the Authority shall have the right or entitlement to any portion of the City of Dallas water in Lake Tawakoni or Lake Fork Reservoirs.

The locations of pertinent features related to this certificate are shown on Page 7 of the Upper Sabine River Segment Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 188th Judicial District Court of Gregg County, Texas, in Cause No. 86-255-A, In Re: The Adjudication of Water Rights in the Upper Sabine River Segment of the Sabine River Basin dated June 9, 1986, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Sabine River Compact.

This certificate of adjudication is issued subject to senior and superior water rights in the Sabine River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

Paul Hopkins

Paul Hopkins, Chairman

DATE ISSUED:

MAY 2 1988

ATTEST:

Karen A. Phillips

Karen A. Phillips, Chief Clerk

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 03-4836

OWNER: City of Texarkana
Texarkana Water & Sewer Systems
P. O. Box 2008
Texarkana, Texas 75501

COUNTIES: Bowie and Cass

PRIORITY DATES: March 5, 1951; February 17, 1957; September 19, 1967 and May 18, 1981

WATERCOURSE: Sulphur River

BASIN: Sulphur River

WHEREAS, by final decree of the 202nd Judicial District Court of Bowie County, in Cause No. 86-C1702-202 In Re: The Adjudication of Water Rights in the Sulphur River Basin dated December 17, 1986 a right was recognized under Permit 1563C authorizing the City of Texarkana to appropriate waters of the State of Texas as set forth below;

WHEREAS, the United States of America, pursuant to the Flood Control Act of 24 July 1946 (Public Law 526, 79th Congress, 2nd Session), has constructed and operates and maintains the Wright Patman Dam and Reservoir on the Sulphur River in Cass and Bowie Counties;

WHEREAS, on the 16th day of September, 1968, the City of Texarkana entered into a contract (DACW-29-69-C-0019) with the United States of America for storage space of water in Wright Patman Reservoir;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Sulphur River Basin is issued to the City of Texarkana, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to impound water in a Reservoir (Wright Patman Reservoir) located on the Sulphur River which is owned by the United States of America and operated by the Corps of Engineers in accordance with the following impoundment schedule. The Dam is located in the Jesse M. C. Paxton Survey, Abstract 830 in Cass County; the A. H. Elliott Survey, Abstract 196; the W. D. Schocklie Survey, Abstract 528; the G. A. Sims Survey, Abstract 558; the T.& P. RR Company Survey, Abstract 595; the John T. Watson Survey, Abstract 649; the William White Survey, Abstract 679 and the Charles Caldwell Survey, Abstract 823 in Bowie County, Texas.

Month	Maximum Impoundment and Elevation
January	224.9 (265,300 acre-feet)
February	224.9 (265,300 acre-feet)
March	224.9 (265,300 acre-feet)
April	226.8 (325,300 acre-feet)
May	228.6 (385,800 acre-feet)
June	228.6 (386,900 acre-feet)
July	228.5 (380,800 acre-feet)
August	227.8 (355,700 acre-feet)
September	226.8 (324,900 acre-feet)
October	226.1 (302,000 acre-feet)
November	225.5 (282,600 acre-feet)
December	225.2 (273,600 acre-feet)

2. USE

A. Owner is authorized to divert and use not to exceed 45,000 acre-feet of water per annum from the aforesaid reservoir for municipal purposes.

B. Owner is also authorized to divert and use not to exceed 135,000 acre-feet of water per annum from the aforesaid reservoir for industrial purposes.

C. Owner is further authorized to transfer water lawfully diverted under the provisions of Paragraphs A and B above, from Wright Patman Reservoir in the Sulphur River Basin, the basin of origin, for use in the Cypress Creek Basin and in the Red River Basin in the following amounts and for the indicated purposes:

(1) Not to exceed 4500 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Cypress Creek Basin for municipal purposes.

(2) Not to exceed 4500 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Cypress Creek Basin for industrial purposes.

(3) Not to exceed 6500 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Red River Basin for municipal purposes.

(4) Not to exceed 5000 acre-feet of water per annum may be diverted from the Sulphur River Basin to the Red River Basin for industrial purposes.

3. DIVERSION

A. Location:

(1) At a point on the perimeter of the aforesaid reservoir in the M.E.P.& P. RR Company Survey, Abstract 422, Bowie County, Texas.

(2) At a point on the perimeter of the aforesaid reservoir in the James Giles Survey, Abstract 404, Cass County, Texas.

(3) At a point on the perimeter of the aforesaid reservoir in the Jesse M. C. Paxton Survey, Abstract 830, Cass County, Texas.

B. Maximum combined rate: 320.00 cfs (144,000 gpm).

4. PRIORITY

A. The time priority of owner's right is March 5, 1951 for the diversion and use of the first 14,572 acre-feet of water for municipal purposes.

B. The time priority of owner's right is February 17, 1957 for the diversion and use of the next 10,428 acre-feet of water for municipal purposes and the first 35,000 acre-feet of water for industrial purposes.

C. The time priority of owner's right is September 19, 1967 for the diversion and use of the remaining 20,000 acre-feet of water for municipal purposes and 100,000 acre-feet of water for industrial purposes.

D. The time priority of owner's right is May 18, 1981 for the transbasin diversions of water.

5. SPECIAL CONDITIONS

A. Persons or entities who may acquire (other than as customers of the city's municipal water system) the right to use water authorized to be appropriated hereunder shall obtain permits from the Commission before commencing use of such water.

B. Owner shall maintain continuous reservoir content and lake level measuring station; record all discharges through the reservoir and maintain daily record of all diversions from said reservoir. All records shall be compiled monthly and reported to the Commission annually.

The locations of pertinent features related to this certificate are shown on Page 12 of the Sulphur River Basin Certificates of Adjudication Maps, copies of which are located in the office of the Texas Water Commission, Austin, Texas.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 202nd Judicial District Court of Bowie County, Texas, in Cause No. 86-C1702-202 In Re: The Adjudication of Water Rights in the Sulphur River Basin dated December 17, 1986 and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Sulphur River Basin.

This certificate of adjudication is issued subject to the obligations of the State of Texas pursuant to the terms of the Red River Compact.

This certificate of adjudication is issued subject to the Rules of the Texas Water Commission and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

/s/ Paul Hopkins
Paul Hopkins, Chairman

DATE ISSUED:

MAR 31 1987

ATTEST:

/s/ Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

ATTACHMENT 7

CLARK et al.
v.
BRISCOE IRR. CO.

No. 9588.

Court of Civil Appeals of Texas, Austin.

Feb. 19, 1947.

Rehearing Denied March 5, 1947.

Appeal from District Court, Travis County; J. Harris Gardner, Judge.

Action by Briscoe Irrigation Company against C. S. Clark and others for declaratory judgment or for alternative relief by mandamus and otherwise. From a judgment for plaintiff, defendants appeal.

Affirmed in part and reversed and rendered in part.

[1] STATUTES ⊂226
361k226
Texas statutes governing appropriation of public waters, adopted from statutes of Wyoming and Nebraska, must be given the same construction as had been given them by courts of those states before their adoption in Texas. Vernon's Ann.Civ.St. art. 7592; Laws Wyo.1895, c. 45; Laws Neb.1895, c. 69.

[2] WATERS AND WATER COURSES ⊂145
405k145
In Colorado and Wyoming, water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily, and use of the water may be changed from irrigation of one tract to irrigation of another if change does not injure other appropriators. Vernon's Ann.Civ.St. arts. 7559, 7592.

[2] WATERS AND WATER COURSES ⊂153
405k153
In Colorado and Wyoming, water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily, and use of the water may be changed from irrigation of one tract to irrigation of another if change does not injure other appropriators. Vernon's Ann.Civ.St. arts. 7559, 7592.

[3] WATERS AND WATER COURSES ⊂142
405k142
A water right, perfected under either the posting or the permit system, constitutes a vested interest in or title to use of the water, which is assignable except where attaching to specific land and carries with it the incidental right to change to any lawful place or purpose of use, subject only to regulations imposed by laws of the state granting appropriation. Vernon's Ann.Civ.St. arts. 7559, 7592.

[3] WATERS AND WATER COURSES ⊂153
405k153
A water right, perfected under either the posting or the permit system, constitutes a vested interest in or title to use of the water, which is assignable except where attaching to specific land and carries with it the incidental right to change to any lawful place or purpose of use, subject only to regulations imposed by laws of the state granting appropriation. Vernon's Ann.Civ.St. arts. 7559, 7592.

[4] WATERS AND WATER COURSES ⊂128
405k128
All Texas water appropriation laws, having been passed after adoption of constitutional amendment on conservation, must be construed in light of such amendment and of its objectives, express and implied. Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592; Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a.

[5] WATERS AND WATER COURSES ⊂128
405k128
The 1917 constitutional amendment on conservation evidences clear and explicit purpose to conserve public waters of the state and to develop their use in the public interest. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a.

[6] WATERS AND WATER COURSES ⊂133
405k133
The state board of water engineers has power and duty to determine, in exercise of sound and reasonable discretion, whether uses for which application for appropriation of waters is made, meet statutory objectives including that of being in the public interest. Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506- 7510, 7515, 7592.

[7] WATERS AND WATER COURSES ⊂133
405k133
The state board of water engineers has continuing duty of supervising distribution and use of public waters so as to attain constitutional and statutory objectives, and any substantial change in use or place of use, not authorized in original permit, must have their approval.

Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592; Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a.

[8] WATERS AND WATER COURSES ⚖145
405k145
The doctrine "inclusio unius est exclusio alterius" requires that statute dispensing with necessity for permit in event of changes in canal, ditch or other work not resulting in increased appropriation be construed as excluding possibility of changing place and purpose of use without permit. Vernon's Ann.Civ.St. art. 7495.

[9] WATERS AND WATER COURSES ⚖145
405k145
Power of state board of water engineers to determine public policy involved in change of use of water appropriated is not arbitrary but must be exercised with due regard to applicant's rights. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[10] CONSTITUTIONAL LAW ⚖62(5.1)
92k62(5.1)
Formerly 92k62(5), 92k62
In granting right to appropriate state-owned waters, legislature may prescribe conditions governing their use or change in use, and delegate to board of water engineers the authority and duty to see that such conditions are met. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

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[11] WATERS AND WATER COURSES ⚖145
405k145
The water statutes create no absolute right to change place or purpose of use of appropriated waters, but only vested right of change subject to control by legislature. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[12] WATERS AND WATER COURSES ⚖133
405k133
Statutory requirements governing exercise of rights under appropriation of waters in effect when application for appropriation was granted became ingredient elements of rights under such application. Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[13] CONSTITUTIONAL LAW ⚖80(2)
92k80(2)
Powers and duties of state board of water engineers with respect to permitting change in use of appropriated waters are not "judicial" as affecting validity of statutes conferring such powers and duties. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.
See publication Words and Phrases for other judicial constructions and definitions.

[13] WATERS AND WATER COURSES ⚖128
405k128
Powers and duties of state board of water engineers with respect to permitting change in use of appropriated waters are not "judicial" as affecting validity of statutes conferring such powers and duties. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.
See publication Words and Phrases for other judicial constructions and definitions.

[14] ADMINISTRATIVE LAW AND PROCEDURE ⚖235.1
15Ak235.1
Formerly 15Ak235
Fact finding is not an exclusive "judicial function" but an element essential to proper exercise of discretion in governmental officials or agencies, whether executive, legislative or administrative.
See publication Words and Phrases for other judicial constructions and definitions.

[14] CONSTITUTIONAL LAW ⚖52
92k52
Fact finding is not an exclusive "judicial function" but

an element essential to proper exercise of discretion in governmental officials or agencies, whether executive, legislative or administrative.
See publication Words and Phrases for other judicial constructions and definitions.

[14] CONSTITUTIONAL LAW ⊜79
92k79
Fact finding is not an exclusive "judicial function" but an element essential to proper exercise of discretion in governmental officials or agencies, whether executive, legislative or administrative.
See publication Words and Phrases for other judicial constructions and definitions.

[15] CONSTITUTIONAL LAW ⊜50
92k50
Whether a power or function conferred upon official or other governmental agency is judicial, "legislative", "executive" or "administrative" depends upon inherent nature or quality of the power or function, irrespective of whether it involves discretion.
See publication Words and Phrases for other judicial constructions and definitions.

[16] WATERS AND WATER COURSES ⊜145
405k145
In determining whether permitting change in use of appropriated waters would be detrimental to public welfare, state board of water engineers has power and duty to ascertain relevant facts and discretion to determine effect of such facts. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59; subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[17] ADMINISTRATIVE LAW AND PROCEDURE ⊜209
15Ak209
Generally, legislature may not delegate to a nonlegislative agency the duty to determine public policy, but must itself determine that policy and must prescribe definite standards and criteria for exercise of delegated duty of regulation in regard thereto.

[17] CONSTITUTIONAL LAW ⊜62(2)
92k62(2)
Formerly 92k62
Generally, legislature may not delegate to a nonlegislative agency the duty to determine public policy, but must itself determine that policy and must prescribe definite standards and criteria for exercise of delegated duty of regulation in regard thereto.

[18] CONSTITUTIONAL LAW ⊜62(5.1)
92k62(5.1)
Formerly 92k62(5), 92k62
Statutes empowering state board of water engineers to determine whether change in use of appropriated waters will be detrimental to public welfare are not invalid as delegating to the board the power to determine public policy on appropriation of waters. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

[18] WATERS AND WATER COURSES ⊜128
405k128
Statutes empowering state board of water engineers to determine whether change in use of appropriated waters will be detrimental to public welfare are not invalid as delegating to the board the power to determine public policy on appropriation of waters. Vernon's Ann.St.Const. art. 2, § 1; art. 16, § 59, subd. a; Vernon's Ann.Civ.St. arts. 7466, 7467, 7470, 7470a, 7471, 7472c, 7472d, 7492, 7493-7495, 7506-7510, 7515, 7592.

*676 Grover Sellers, Atty. Gen., and E. M. DeGuerin, W. P. Watts and Geo. W. Barcus, Asst. Attys. Gen., James V. Allred, Vinson, Elkins, Weems & Francis and Victor W. Bouldin, all of Houston, for appellants.

Morris Jamison, of Houston, and Powell, Wirtz, Rauhut & Gideon, and Ben H. Powell, Jr., all of Austin, for appellee.

McCLENDON, Chief Justice.

This appeal is from a declaratory judgment decreeing in effect that the owner of a permit granted by the Board (Board of Water Engineers of the State of Texas) in April 1940, authorizing the appropriator (permittee) to divert from a Texas stream a specified amount of water for the purpose of irrigating specifically described land (the right to which appropriation has ripened into a title), is not required to apply to the Board for authority to substitute other lands for those designated in the permit, or to change the purpose of use of the water from irrigation to other lawful uses; the right of such appropriator being free of any regulation or control by the Board, so long as the new use is a beneficial one authorized by law, and does not (1) result in an increased appropriation or taking a greater quantity of water than authorized in the permit; or (2) impair the vested rights of other appropriators.

The correctness of this holding controls the decision

of the case upon its merits.

Substantially, the facts are these:

April 6, 1940, the Board, upon his application and after due notice and hearing granted to R. T. Briscoe a permit to 'divert, appropriate and use' not exceeding 75,000 acre-feet per annum of the unappropriated waters of the Brazos River, in Fort Bend County, 'when beneficially used for the purpose of irrigation, mining, and municipal use.' Not exceeding 50,000 acre-feet per annum of this amount was for the purpose of irrigating not exceeding 25,000 acres of land per annum out of a tract of 87,155 acres described by metes and bounds and situated in Fort Bend, Brazoria and Galveston Counties; with the further limitation of not exceeding in any one year 'two acre-feet per acre for each acre actually irrigated within the 25,000 acres.' This permit was later acquired by Briscoe Irrigation Company, plaintiff below and appellee here. The 25,000 acre-feet for mining and municipal purposes is not here involved as it was not put to beneficial use, and so decreed by the trial court. The 50,000 acre-feet was put to the beneficial use of irrigating the lands authorized in the permit; and the right thereto became vested under art. 7592, R.C.A. August 13, 1945, appellee filed with the Board an application to amend the permit so as to substitute other specified lands for those designated in the permit and to change the purpose of use so as to include mining, manufacturing, and municipal. After proper notice and hearing the Board denied this application on December 13, 1945. This suit was filed by appellee on January 8, 1946, against the Board and others, in which it sought the following relief:

1. A declaratory judgment decreeing that it was not required to obtain an amendment of its permit from the Board as a prerequisite:

a. To change the place of use of its waters in the manner alleged.

b. To change the purpose of use of its waters to include mining, manufacturing and municipal.

*677 2. In the alternative, if it were held that an amendment of the permit was required, a declaratory judgment decreeing that the function of the Board was purely ministerial, with no discretion to deny the application; and that mandamus to compel approval of the amendment be awarded.

3. In the alternative, if the Board were held to have any discretion in the matter, a decree that the refusal o the Board was a gross abuse of its discretion, and th mandamus issue to compel approval of the application.

4. A decree (a) as between appellee and defendants other than the Board, and (b) as between appellee and the State that appellee has the right to extend its canal and supply its appropriated waters to irrigate the lands described in the application and for industrial and other lawful uses in or near Texas City or elsewhere in Galveston County.

5. A decree quieting appellee's vested title in its appropriated waters, and its right inherent therein to change the place and purpose of use thereof without interference from defendants, and that cloud upon its said title by reason of claims of defendants be removed.

During the course of the trial (to the court without a jury) all testimony offered by appellants in support of their contention that the Board had properly exercised whatever discretion it had in denying the application to amend the permit, was excluded upon objection of appellee's counsel upon the ground that the only issue in the case was whether appellee had the right to use the water for other beneficial purposes than those stated in the permit, and whether the Board had any discretion at all in such matters. This statement of appellee's counsel and ruling of the court eliminated from the case the alternative relief sought under paragraphs designated 2 and 3 above; and the court rendered judgment declaratory of appellee's rights as sought under paragraphs 1 and 4 above, and quieted the title of appellee as against other defendants than the Board as sought in paragraph 5 above.

No issue is raised questioning the perfection of appellee's title under art. 7592 to the use of 50,000 acre-feet of water authorized for irrigation purposes in the permit. Consequently, that portion of the decree quieting appellee's title thereto need not be considered.

Appellee's contention in support of the portion of the decree awarding the declaratory relief sought under paragraphs 1 and 4 above may be epitomized as follows:

[1] Texas statutes governing appropriation of public waters were adopted from those of Wyoming and Nebraska and must therefore be given the same construction as had been given them by the courts of those states prior to their adoption in Texas (See Board of Water Engineers v. McKnight, 111 Tex. 82, 229

S.W. 301, 304). Under such prior holdings in those states, where the appropriation of waters authorized in a permit had ripened into a vested title, the owner of the permit had the untrammeled and unrestricted right to change the place and character of use of such waters to any lawful place and use thereof other than those designated in the permit, without the necessity of sanction of a board or other governing authority, absent (as in our statutes) an express statutory requirement for an amendment of the permit in these regards with approval of such governing authority.

The legal doctrine embodied in the first sentence of this epitomization is one of such general acceptance as to require no elaboration here. Its application in the McKnight case was stated thus: 'The presumption is indulged that our Legislature was aware of the fixed judicial interpretation of the statutes in the states from which they were copied, and having been adopted, as thus construed, their validity is to be determined in the light of such construction.' If, therefore, our statutes, in the respects in question, were copied from those of other states, in which, at the time of their enactment here there was a 'fixed judicial interpretation' thereof in those states to the effect as contended by appellee and decreed by the court below, then it would follow that the decree in these regards is correct. Otherwise, our statutes must be construed by applying generally accepted rules of interpretation to the language employed and the objectives in view.

*678 In an elaborate brief which evidences able, exhaustive and painstaking research, and which is most interesting and instructive, appellee's counsel have presented a learned treatise upon the origin and development of water rights law in the several western states, as gleaned from custom, statutes, adjudicated cases, standard texts, and the works of eminent specialists upon the subject. This has been most helpful in resolving the issues and reaching the conclusions essential to a proper decision in the case. We do not deem it necessary to do more than briefly summarize this origin and development, and even that only in the respects and to the extent necessary to a clear statement of the essential conclusions we have reached.

We are dealing here only with appropriated waters, consequently riparian rights are not involved and need not be discussed.

The appropriation system of water rights law seems to have had its origin in customs of the miners in some of our western states in the decade preceding the Civil War. These customs were later crystallized into statutes which authorized appropriation by giving certain notice by posting, stating the place and purpose of use of the waters. Such appropriation, when followed by the prescribed use, gave the appropriator a vested right or title, as of the date of the notice, to use of the waters thus appropriated, which was superior to that of any subsequent appropriator. This right or title was perpetual, unless lost by abandonment, was assignable, and carried with it as an incident of title, the right to change the place and purpose of use at the pleasure of the appropriator, to any lawful place or purpose of use other than that designated in the original notice. This was the generally accepted view, as expressed in statutory enactments and judicial decisions under the notice system. This view is not questioned by appellants.

The first permit statute appears to have been passed by Wyoming in 1895, Laws 1895, c. 45, which was the prototype of those later passed in other states. It was followed in the same year by Nebraska. Laws 1895, c. 69. These are the states from which it is contended, and may be conceded for our present purposes, the original Texas permit statute of 1913, and the later 1917 more elaborate statute were in large measure, at least, copied. These statutes prescribed the purposes for which appropriation might be had, and delegated to a governing agency the function of passing upon the right to the permit. Their provisions need not be further detailed here. We have carefully examined all the authorities cited by appellee in support of the trial court's decree, and we do not find that any of them either involved or decided the specific question posed by the decree here involved. It is conceded that this question is one of first impression in this State. The cases which appear to be most strongly relied upon by appellee are: Farmers' & Merchants' Irrigation Co. v. Gothenburg Water Power & Irrigation Co., 1905, 73 Neb. 223, 102 N.W. 487; Johnston v. Little Horse Creek Irrigating Co., 1904, 13 Wyo. 208, 79 P. 22, 70 L.R.A. 341, 110 Am.St.Rep. 986; and State of Wyoming v. State of Colorado, 298 U.S. 573, 56 S.Ct. 912, 80 L.Ed. 1339.

The Nebraska case was one between two rival appropriators whose rights accrued under the notice system and prior to the permit statutes. We quote from the opinion [73 Neb. 223, 102 N.W. 488]: 'Under the law existing in 1894, the defendant had the right to extend its ditch and change the use of the water so as to use it all for irrigation purposes, instead of for power, if it so desired; and therefore the holding of the board of irrigation and the district court that it had a prior

right to the use of the whole 200 inches of water is correct. But since the irrigation (permit) law of 1895 has been enacted, under its provisions, by which the water must be attached to the land, it is incumbent upon the defendant clearly to specify in its application the identical lands upon which the water has been applied. The section of the statute allowing an extension of the ditch or a change of the place of use must be construed together with the provisions of the 1895 law, and while a prior appropriator may change the place of use of water which had already been appropriated, *679 it can only do so under the permission and subject to the administrative control of the board of irrigation.' (Emphasis added.)

The opinion was by a Supreme Court Commissioner. Its approval was given in a per curiam opinion of the Supreme Court, reading: 'For the reasons stated in the foregoing opinion, the decision of the district court as to priorities is approved, and the cause reversed and remanded, with directions to ascertain and set forth in the decree the specific lands to which the appropriation of the defendant attaches, and for such further proceedings as may be necessary to that end.'

Not only did the rights there involved accrue under prior posting laws, but the court held in the above quotation that the rights acquired under the prior laws were subject to and governed by the provisions of the 1895 permit law, under which, as construed by the court (and as subsequently enacted by statute) the water rights for irrigation purposes attached to the land designated in the appropriation authorization. It is not contended that this is now, or ever has been, the law of this State; except where governed by contract between appropriator and landowner (art. 7559).

The Wyoming case also was a contest between appropriators and involved an appropriation prior to statehood.

Appellee quotes the following from State of Wyoming v. State of Colorado, the author of the opinion being Mr. Justice Van Devanter, an acknowledged 'authority on land and water laws in the Western States' [298 U.S. 573, 56 S.Ct. 917]: 'In both Colorado and Wyoming water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators. The rules in this regard are but incidental to the doctrine of appropriation.'

[2] There is no question but that this is an accurate statement of the law both generally and as applied to the case there at bar. That was a contest between two sovereign states, representing both themselves and appropriators under their respective laws. No issue regarding the power or right of control of the individual state over appropriations acquired under its laws was involved.

[3] Nor is there any question but that a water right, when acquired and perfected either under the posting or permit system, constitutes a vested interest in or title to the use of the water thereby appropriated. Which interest or title is assignable (except where attaching to specific land) and carries with it the incident right to change the place or purpose of use to any lawful place or purpose of use other than that designated in the original appropriation, subject only to such regulations and restrictions as may be imposed by the laws of the state granting the appropriation. Since we do not find, as regards statutes of other states from which our permit appropriation laws were copied, any adjudication to the effect that, absent an express statutory requirement, the exercise of this right of change of place or purpose of use is absolute, and not subject to any regulation or control of the governing board, the question here must be determined by an examination of our statutes upon the subject.

Our permit laws were first enacted in 1913. In 1917 a more comprehensive statute was enacted. This latter was designed, among other things, to provide for the determination of existing water rights upon the several water courses in Texas, and for the preservation of a permanent record thereof. In this regard the statute was a copy of those previously adopted in Nebraska and Wyoming. In the McKnight case the validity of the statute in these respects was challenged and it was held invalid on the ground that it attempted to confer upon the Board (an administrative body) judicial powers in violation of Sec. 1 of art. II of our Constitution, Vernon's Ann.St., even though the right of judicial review of the Board's orders was given. It is interesting to note that, although these provisions of the Act were given the construction previously given them by the *680 courts of Nebraska and Wyoming, the decisions of those states upholding them were not followed. The 1917 Act was passed prior to the 1917 conservation amendment to the Constitution, art. XVI, Sec. 59a, and in the recent case of Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961, it was held that the McKnight decision was limited to statutes passed prior to that amendment, and that subsequent statutes conferring quasi-judicial powers upon administrative

boards in connection with our conservation laws, where judicial review was given, were not violative of Constitution art. II, Sec. 1.

All of our water appropriation laws were passed subsequently to the 1917 constitutional amendment. That is, they were either re-enacted by being carried forward into the 1925 codification, or were enacted subsequently thereto. Const. art. XVI, Sec. 59a, reads, in part, as follows: 'The conservation and development of all the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi- arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.'

[4] All of our water appropriation laws having been passed subsequently to the adoption of this amendment they must be construed in the light of it and of its objectives, both expressed and implied.

The following statutory provisions we regard as controlling of the question at issue. All emphasis is supplied.

Art. 7466 declares the public policy of the state in accordance with the 1917 amendment.

Art. 7467 declares that the ordinary flow and underflow, and the storm, flood and rain waters of every river or natural stream, etc., within this State, and the right to the use thereof 'are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter.'

Arts. 7470 and 7470a prescribe the following as the purposes for which water may be appropriated: irrigation, mining, milling, manufacturing, development of water power, construction and operation of waterworks for cities and towns, public parks, game preserves, recreation and pleasure resorts, power and water supply for industrial purposes and plants and domestic uses.

Art. 7471 provides: In the conservation and utilization of water declared to be the property of the State, the public welfare requires not only the recognition of uses beneficial to the public well-being, but requires as a constructive public policy, a declaration of priorities and appropriation thereof. These priorities so declared are: (1) Domestic and municipal uses; (2) uses to convert material from a lesser to a greater value; (3) irrigation; (4) mining; (5) hydro-electric power; (6) navigation; (7) recreation and pleasure.

Art. 7472c reads: 'Conservation of water resources for public welfare

'In the administration of laws provided for the maximum judicious employment of the State waters in the public interest, it shall be the duty of the State Board of Water Engineers, or other administrative agency designated for the service by the State, to conserve this natural resource in the greatest practicable measure for the public welfare; and recognizing the Statutory precedent established for granting the privilege to take and utilize the waters of the State for uses recognized and authorized, it shall be the duty of the State Board of Water Engineers or other agency of the State designated for the purpose to *681 observe the rule that as between applicants for rights to use the waters of the State, preference be given not only in the order of preferential uses declared, but that preference also be given those applications the purposes for which contemplate and will effectuate the maximum utilization of waters and are designated and calculated to prevent the escape of waters without contribution to a beneficial public service.'

Art. 7472d reads: 'Surveys to disclose measure and potential availability of water resources

'It shall be the purpose and policy of the State and of the enactments in accord therewith, in effecting the greatest beneficial utilization of waters of the State, to cause to be made all surveys essential to disclose the measure and potential availability of the water resources of the State to uses recognized; and to ascertain from necessary investigation the character of the principal requirements of the distinct regional division of the watershed areas of the State for the uses herein authorized, to the end that distribution of the right to take and use the waters of the State may be more equitably administered in the public interest, and

privileges granted for the uses recognized may be economically co-ordinated, achieving the maximum of public value from this resource; and recognizing alike the distinct regional necessities for water control and conservation, and for control of harmful floods.'

Art. 7492 requires that every person, etc., who desires to acquire the right to appropriate unappropriated waters 'shall before commencing the construction, enlargement or extension of any dam,' etc., 'in connection with the storage, taking or diversion of water, make an application in writing to the Board for a permit to make such appropriation, storage or diversion.'

Art. 7493 reads: 'Such application shall be in writing and sworn to; shall set forth the name and post-office address of the applicant; the source of water supply; the nature and purposes of the proposed use; the location and description of the proposed dam, lake, reservoir, headgate, intake, pumping plant, ditch, canal or other work; the time within which it is proposed to begin construction, and the time required for the application of the water to the proposed use; and, if such proposed use is for irrigation, a description of the lands proposed to be irrigated, and as near as may be, the total acreage thereof.'

Art. 7494 requires filing maps and other data in connection with the application.

Art. 7495 reads: 'Nothing in this Act shall be held or construed to require the filing of an application or procuring of any permit for the alteration, enlargement, extension or addition to any canal, ditch, or other work that does not contemplate, or will not result in, an increased appropriation, or the use of a larger volume of water, but before making any such alteration, enlargement, extension or addition, the person, association of persons, corporation or irrigation district desiring to make same, shall file with the Board of Water Engineers a detailed statement and plan for the information of the board, of the work proposed to be done.'

Art. 7506 makes it the duty of the Board to reject the application if (inter alia) it 'is detrimental to the public welfare.' The wording of this article was in some respects slightly changed by amendment in 1943, Acts 48th Leg., p. 455, ch. 303, § 1. The change is, if in fact any in substance, not important here. The quoted wording was not changed.

Art. 7507 reads: 'It shall be the duty of the Board to approve all applications and issue the permit asked for if such application is made in proper form in compliance with the provisions of this chapter and the regulations of said Board; and is accompanied by the fees required in this chapter; and if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this chapter, and does not impair existing water rights, or vested riparian rights and is not detrimental to the public welfare.'

Provisions for notice and hearing of the application are contained in arts. 7508-10, and the contents of the permit are prescribed in art. 7515 which include: 'the use or purpose for which the appropriation of water is to be made,' and if for irrigation '*682 a description and statement of the approximate area of the land to be irrigated; together with such other data and information as the Board may prescribe.'

Art. 7592 provides that where an appropriator 'shall have made use of the water, under the terms of such * * * permit for a period of three years * * * he shall be deemed to have acquired a title to such appropriation by limitation, as against any and all other claimants of water from the same stream, or other source of water supply, and as against any and all riparian owners upon said stream or other source of water supply.'

[5] The 1917 constitutional amendment, art. XVI, § 59a, evidences a clear and explicit purpose to conserve the public waters of the State and to develop their use in the public interest. To this end the express affirmative duty is enjoined upon the Legislature '[to] pass all such laws as may be appropriate thereto.' This general public policy was thereafter carried forward into our water laws, which set forth the purposes for which appropriation may be acquired, the order of priority in the different uses to which the waters may be applied, and provide for the determination by the Board,' not only of questions relating to whether the statutory requirements are met, but whether granting the application for permit will subserve the public interest. No right of appropriation may be acquired without application to the Board, setting forth the place and purpose of use, and a permit granted by the Board designating the place and purpose of use. The Board is charged with the duty of duly informing itself upon all matters relating to the proper performance of its duties in passing upon the application; is required to have a hearing after due notice to all interested parties; and is charged with the express duty to determine, inter alia, whether granting the permit will best subserve the public interest.

[6] There statutory provisions clearly invest the Board with the power and duty to determine whether the uses for which the application is made meet the statutory objectives, including that of being in the public interest. Necessarily the determination of that issue involves the exercise of a sound and reasonable discretion. Nor is it contended that the Board has not such discretion in passing upon an original application.

[7] Every consideration for vesting such original discretion in the Board applies with equal force for its exercise in case of change of purpose or place of use. We therefore think there is implicit in these provisions of our laws, constitutional and statutory, a vesting in the Board of the continuing duty of supervision over the distribution and use of the public waters of the State so as to see that the constitutional and statutory objectives are attained, and carrying with it the requirement that any substantial change in use or place of use not authorized in the original permit, must have the approval of the Board. Any other construction might easily result in defeat or circumvention of the objectives of the conservation laws.

[8] Art. 7495, quoted above, dispensing with necessity for a permit, is expressly limited to 'the alteration, enlargement, extension or addition to any canal, ditch or other work that does not contemplate, or will not result in, an increased appropriation,' etc. Place and purpose of use might have been embodied in the article as easily and simply as alteration in canals and other works. The fact that they were not so embodied, in itself constitutes a manifest legislative purpose to exclude them, and has the effect of strengthening the implication in the other statutes that application to the Board for authority to make changes of this character was required. The doctrine of inclusio unius est exclusio alterius would seem to require this construction.

We hold that authority of the Board is essential to authorize a change in use or place of use from that authorized in the permit.

[9] This holding is not inconsistent with a vested title in appellee to the use of the appropriated waters, nor with its right, as an incident to such title, to have the place and purpose of such use changed. The restriction upon such right of change extends only to the power and duty of the Board to determine the public policy involved *683 in such change. This power is not an arbitrary one but must be exercised with due regard to the rights of the applicant. Against the arbitrary abuse of such discretion, the applicant is not without remedy. Whether the Board properly exercised its delegated authority and discretion in the present instance is not brought in question in this appeal. Granted (as we hold) that the Board is vested with any authority and discretion in the matter, its order is presumptively valid; and no effort was made by appellee to show it otherwise.

[10][11][12] Appellee contends that the Board cannot be given the power to exercise control over the vested right of change of purpose or place of use of the water, because no right of judicial review of the Board's action is given, citing the above holding in Corzelius v. Harrell, modifying or at least limiting the holding in the McKnight case. It is true that no right of review is given of orders of the Board dealing with applications for appropriation except where the water is to be taken 'from any natural stream, water course, or watershed.' Art. 7590. Such appeal is to the district court 'of the county in which such diversion is proposed to be made.' In whatever respects the change in place of use was to a watershed other than that (or those) in which the lands described in the permit are located, the right of review is given. Independently, however, of the right of review, we see no consequent impediment to the power of the Legislature, in granting the right of appropriation of State owned waters, to prescribe conditions governing their use or change in use, and delegating to the Board the authority and duty to see that those conditions are met. The Board could not be invested with the power to destroy or impair vested rights. If, therefore, the right to change the place or purpose of use were an absolute one and not subject to regulation at the time of its vesting, it may be conceded that neither the Legislature nor the Board acting under its authority, could thereafter deny or impair that right. As we construe the statutes no such absolute right was created; but only the vested right of change, subject to such control thereof as the Legislature had prescribed. All of the statutes governing the exercise of the rights acquired under the appropriation were, as stated, in effect at the time the application was granted, and their requirements entered into and became ingredient elements of those rights, affecting their future exercise.

[13][14][15][16] Nor do we think the powers and duties conferred upon the Board in the respects in issue are in any proper sense judicial. Fact finding is not an exclusive judicial function. In respects in which discretion inheres or is vested in a governmental official or agency, fact finding is an element or ingredient essential to a proper exercise of such discretion, whether the function of such official or

agency be executive, legislative or administrative. An able discussion of this subject will be found in State v. Kelly, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156. Ratemaking is essentially a legislative function (Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150; Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Tex.Civ.App., 3 S.W.2d 489, affirmed Producer's Refining Co. v. Missouri-K. & T. R. Co. of Texas, Tex.Com.App., 13 S.W.2d 679), yet fact finding is one of its essential elements. Fact finding is essential to intelligent action in most, if not all, fields of appropriate remedial legislation; and is a fruitful source of legislative investigation through committees, commissions, etc. See Watts v. Mann, Tex.Civ.App., 187 S.W.2d 917 (error ref.). Whether a power or function, which is conferred upon an official or other governmental agency, is properly classified as judicial, legislative, executive, administrative or otherwise, depends upon the inherent nature or quality of the power or function, irrespective of whether it involves discretion, and, as an incident thereto, fact finding. In the case of Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 475, it was held that the duties conferred upon the Board 'to reject all applications and refuse to issue the permit asked for if there is no unappropriated water in the source of supply, or if the proposed use conflicts with existing water rights, or is detrimental to the public welfare,',' (*684 Emphasis added) were 'ministerial duties,' the remedy for refusal to perform which would be the same as in other like cases. Unless we read out of this provision as meaningless the determination of whether the proposed appropriation for the purposes and places of use set forth in the application is 'derimental to the public welfare,' then necessarily the Board is invested with the power and duty to ascertain the facts relevant to that issue and with the discretion to determine the effect thereon of such facts; and, by parity of reasoning, to resolve the factual issue as to whether a proposed change in the place or purpose of use would be 'detrimental to the public welfare' within the statutory meaning of that term.

[17][18] The further contention is made that the Legislature may not delegate to a non-legislative agency the duty 'to determine the public policy', but must itself determine that policy, and in delegating to an agency the duty of regulation in regard thereto must prescribe definite standards and criteria for the government of such agency, in the exercise of such delegated duty. This general proposition is correct. But we do not construe the language employed in these statutes as delegating to the Board the power to determine the public policy of the State in respect to the appropriation of its waters. That public policy is expressed in the related constitutional and statutory enactments. What is delegated to the Board is to determine from the factual situation presented in each particular case, whether granting the permit would be 'detrimental to the public welfare,' as declared in those enactments. The criteria are the reasonably appropriate measure of fitness, aptitude or relation the use or place of use applied for bears to the public policy or 'public welfare,' declared in the objectives of these enactments, the prescribed uses and priorities in uses, the conservation of the waters and their application and use in the greatest serviceable manner. The criteria are as definite as the subject in its varied applications will reasonably admit, and therefore clearly meet the constitutional test invoked. A case upon practical all fours in this respect is New York Central Securities Corp. v. U. S., 287 U.S. 12, 53 S.Ct. 45, 48, 77 L.Ed. 138. The opinion is by Chief Justice Hughes. The Congressional act there under consideration authorized the Interstate Commerce Commission to permit acquisition by one carrier of control of another, by certain means, whenever, in the opinion of the Commission, such acquisition 'will be in the public interest.' The opinion reads: 'Appellant insists that the delegation of authority of the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920 (41 Stat. 456), was designed better to assure adequacy in transportation service. * * * The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity.'

Closely analogous also are the delegation of power to the Railroad Commission to adjust 'correlative rights' in its gas proration orders, Art. 6008, Sec. 10(b), Vernon's Ann.Civ.St., and the exceptions in Rule 37 'to prevent confiscation,' and 'to prevent waste.' In Corzelius v. Harrell, *685 179 S.W.2d 419, 424, this court upheld the above article against this specific attack, holding: "To adjust correlative rights' affords as definite a criterion as that in the exception to Rule 37 'to prevent confiscation of property' (originally 'to protect vested rights'). That exception has been uniformly upheld, expressly against this particular attack. See Trapp v. Atlantic, [Refining Co.,] Tex.Civ.App., 169 S.W.2d 797, 800, error refused.'

This holding was expressly approved by the Supreme Court. 143 Tex. 509, 186 S.W.2d 961 at page 968.

Under our above holding other questions presented by appellants are immaterial.

In so far as the trial court's judgment vested title in appellee in the use of the appropriated waters as against defendants other than the Board, it is left undisturbed. In all other respects that judgment is reversed and judgment is here rendered for appellants.

Affirmed in part and in part reversed and rendered.

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