

The Texas Natural Resource Conservation Commission (commission) adopts amendments to 30 TAC §303.2, Definitions; §303.21, Accounts - Amistad/Falcon Reservoirs; §303.22, Allocations to Accounts; §303.41, Sale of Water Rights; and §303.42, Amendments. The commission adopts these amendments to correct the spelling of two of the reaches in the Rio Grande, to limit the conveyance of water rights until all fees are paid, to prohibit the transfer of water rights from the Upper Rio Grande to the Lower or Middle Rio Grande below International Amistad Reservoir except for rights holders meeting certain requirements meant to protect other water rights, and to adjust the minimum operating reserve from 150,000 to 75,000 acre feet. The amendments to §303.2 and §303.21 are adopted *with changes* to the proposed text as published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 920). Sections 303.22, 303.41, and 303.42 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Water rights in the portions of the Rio Grande Basin and the Nueces - Rio Grande Basin which are regulated by this chapter are allocated by a watermaster employed by the commission. Water rights in these basins were allocated under the provisions of a judicial adjudication of water rights. *State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex.Civ.App.-Corpus Christi 1969) (*Hidalgo*). Water in portions of the Rio Grande River is shared with the United States of Mexico (Mexico) under several treaties, including the Treaty of 1944 which most specifically addresses the issue of water allocation. The International Boundary and Water Commission (IBWC) oversees the allocations of water between the United States (U.S.) and Mexico, and notifies the watermaster of the amounts of water available for allocation to water rights holders under U.S. jurisdiction.

Water for the allocated water rights in these basins is stored in two international reservoirs, Amistad and Falcon. The U.S. portion of the water is allocated under a schedule established in *Hidalgo*. In this case, the court created several classes of water rights holders under the jurisdiction of the U.S. which have since been modified to Domestic, Municipal, and Industrial (DMI) water users, and Class A and Class B water users. The DMI users have priority rights over Class A and Class B water users. Rules in Chapter 303 apply only to water under U.S. jurisdiction and are not applicable to the Mexican portion of water in the International Amistad and Falcon Reservoirs.

This chapter establishes the levels of the DMI reserve and the operating reserve. The DMI reserve is the minimum amount of water under U.S. jurisdiction which must be stored in the reservoirs to ensure that DMI users have adequate water. When the court determined the allocation of water rights in these basins in the *Hidalgo* adjudication, the court established a DMI reserve of 60,000 acre feet. The commission in July 1986 increased the DMI reserve to its current reserve of 225,000 acre feet which remains unchanged with these amendments. The operating reserve is a minimum volume of acre feet of water which is required to be maintained in the reservoirs to allow for losses of water from evaporation, seepage, and conveyance; to allow for emergencies; and for adjustments of storage accounts. The operating reserve is being decreased in these rules to 75,000 acre feet.

The remaining water under U.S. jurisdiction in the reservoirs is allocated to water rights holders where it is used for beneficial uses or maintained in their storage accounts. If the unallocated water in the reservoirs drops to the minimum operating reserve, the watermaster adjusts allocations for the Class A and Class B water users by deducting water from their storage account balances, called negative

allocations, and adding it to the operating reserve. This reallocation ensures that sufficient water is available for losses due to evaporation, seepage, and conveyance; to allow for emergencies; and for adjustments of storage accounts.

In 1986, the commission promulgated rules setting the operating reserve between 275,000 and 380,000 acre feet, and under drought conditions, setting the operating reserve at 150,000 acre feet. Because of the existence of severe to extreme drought conditions in the Middle and Lower Rio Grande Basins over the past six years, the commission determined there was a need to assess the operational requirements of this system. The adopted rule changes are based on historic data, and for the first time, models of actual reservoir operations over the past six years. Staff reviewed historic data showing actual uses of water in the Rio Grande and the Nueces - Rio Grande Basins from 1988 - 1998, system inflows reported by the IBWC, and other hydrologic data for the same period. Evaluation of this data revealed several important facts which were considered. The greatest amount of evaporative losses which would have occurred in this system was during May 1998, when the total losses from evaporation, conveyance, channel operation, and emergencies would have reduced the operating reserve to 34,471 acre feet, well above the zero acre feet in the operating reserve which will trigger the implementation of negative allocation in these adopted amendments.

Historic data also shows that monthly evaporative losses average 39,623 acre feet. The lowest monthly inflow into the reservoirs averaged over five years of drought is 66,000 acre feet. Because the average monthly evaporative loss is approximately 40,000 acre feet, and the lowest average monthly inflow is 66,000 acre feet, the commission anticipates that the inflow of any one month will exceed the

evaporative loss for that month. A minimum operating reserve of 75,000 acre feet should exceed the difference between the evaporative loss and restorative inflow of any one month.

Based on this data, the commission determined that the operating reserve may be safely changed to 75,000 acre feet with a trigger for negative allocations at zero acre feet, while still protecting DMI water rights. With these adopted amendments, the commission establishes a restoration operating reserve of 48,000 acre feet, which is anticipated to provide sufficient water reserves for any single month's evaporative losses. The commission also anticipates that monthly inflows will then reestablish the operating reserve at 75,000 acre feet within one month, since the average monthly inflow has always exceeded the average monthly evaporative loss.

Therefore, the commission adopts amendments to Chapter 303 lowering the existing operating reserve to 75,000 acre feet. This modification will relieve some of the economic effects of the drought on Class A and Class B water rights holders in these basins. Additionally, the commission adopts amendments lowering the trigger for negative allocations to zero acre feet in the operating reserve from 150,000 acre feet and creating a minimum restoration volume of 48,000 acre feet. A negative allocation occurs when the watermaster subtracts allocations from storage accounts to ensure that sufficient water is available for losses due to evaporation, conveyance, seepage, and emergencies. The commission further adopts amendments requiring the operating reserve to be reestablished to 75,000 acre feet by inflows before the watermaster can make any allocations to Class A and Class B accounts.

SECTION BY SECTION DISCUSSION

Section 303.2 is amended to delete the phrase “unless the context clearly indicates otherwise,” to eliminate ambiguity.

Section 303.2(11)(C) is amended to correct the spelling of “Progreso” in Progreso Bridge.

Section 303.2(11)(D) is amended to correct the spelling of “Progreso” in Progreso Bridge.

Section 303.2(12) is amended to make grammatical corrections.

Section 303.2(22) is amended to add subparagraphs (A) and (B), which define Class A and Class B water rights. Class A and B water rights are rights in the Lower and Middle Rio Grande River held under certificates of adjudication that were granted either in the adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo Co. Water Con. & I. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.), or issued by the commission. The majority of these water rights are irrigation rights, but in recent years some have been converted to other uses. These definitions are being added to define the terms “Class A” and “Class B” water rights, which are currently used in the rules but not defined. Paragraph (22)(A) is amended to make a grammatical correction.

Section 303.21(b)(2) is adopted to establish an operating reserve of 75,000 acre feet. This is a change from the current reserve which fluctuates between 380,000 and 275,000 acre feet, or under drought

conditions, as low as 150,000 acre feet. This change is based in part on recommendations from the Region M Water Planning Group and the Rio Grande Watermaster Advisory Committee to provide additional water to Class A and Class B water rights holders. That recommendation is also based on a study of previous droughts, system inflows, and analyses of the water levels in the system. According to historical data during drought conditions, and modeling of water use in this basin, this change should not affect DMI users. A portion of §303.21(c) is deleted from the rule. This language describes the calculation process for the fluctuating operating reserve. This portion of the rule will no longer be necessary, because with these amendments, the new operating reserve will be established as 75,000 acre feet.

Section 303.22(a) is amended to clarify that dead storage is water behind the dams that cannot be released due to hydrologic restrictions.

Sections 303.22(a)(3) and (4) (relating to Allocations to Accounts) describe how the water for the accounts described in §303.21(b) (relating to Operating Reserve), will be calculated and allocated.

Section 303.22(a)(3) is changed to reflect the change in the operating reserve. Paragraph (4) changes irrigation and mining to Class A and Class B accounts. This paragraph is also amended to clarify that the remaining amount of water will be allocated after the deduction of the operating reserve.

Section 303.22(b) clarifies that the remaining water available for allotment after the deductions under §331.22(a), shall be divided into Class A and Class B water rights, which are defined. The adopted

amendment deletes the phrase “for irrigation and mining uses” which is unnecessary because the commission has added definitions for Class A and Class B water rights holders.

Section 303.22(f)(2) is adopted as new language. The rule states that the watermaster may not allocate water to Class A and Class B water rights holders until the operating reserve is 75,000 acre feet, which is the new operating reserve amount adopted with this rulemaking.

Section 303.22(f)(3) is renumbered and adopted to modify the amount of the operating reserve. Under this chapter, the commission sets an operating reserve and a DMI reserve for the minimum amount of water which must be stored in the reservoirs to ensure that DMI users have adequate water. The operating reserve is a minimum volume of acre feet of water which is required to be maintained in the reservoir to allow for losses of water from evaporation, seepage, and conveyance; to allow for emergencies; and for adjustments of storage accounts. With the adoption of these amendments, the new operating reserve will be 75,000 acre feet. The trigger for negative allocations will be zero acre feet in the operating reserve. If the operating reserve is reduced to zero acre feet, the watermaster adjusts, through negative allocations, the Class A and Class B water accounts to restore the operating reserve to 48,000 acre feet. When the operating reserve has been restored to 48,000 acre feet, negative allocations will cease. Inflows must restore the operating reserve to 75,000 acre feet before any positive allocations may be made. Only Class A and Class B accounts are subject to negative allocations.

Section 303.41 is adopted to clarify that all fees must be paid prior to the sale of water rights. This change is necessary because payment of fees before use is a statutory requirement in Texas Water Code (TWC), §11.329(e).

Section 303.42 has been rearranged for clarity. To create a logical flow, new paragraphs (3) and (4) have been created, and some language has been moved from the existing §303.42 to paragraph (1) and to new paragraph (3) of this section. Section 303.42 currently prohibits the transfer of the water rights from the point of diversion, or place of use of water rights from the Lower and Middle Rio Grande Basins to above International Amistad Reservoir. New language is adopted in §303.42(4) to define the conditions for an inverse sale (from above International Amistad Reservoir to the Lower and Middle Rio Grande Basins). These transfers would be prohibited unless the transfer request uses a conversion factor approved by the commission which would not impair other water rights or water available for allocation. This change is necessary to clarify that such a transfer is not allowed without an approved conversion factor and a showing of no impairment of other water rights because water rights in the Lower and Middle Rio Grande Basins are administered under a totally different system than exists above International Amistad Reservoir. These rights can only be transferred in a manner that ensures protection of other water rights.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that a full regulatory impact analysis (RIA) is not required for the amendments currently adopted to Chapter 303.

The commission's determination is based upon the premise that an RIA is required only for a rule amendment meeting the definition of "major environmental rule" in Texas Government Code, §2001.0225(g)(3). Texas Government Code, §2001.0225(g)(3) states that for a rule change to qualify under that definition, its specific intent would have to be "to protect the environment or reduce risks to human health from environmental exposure." Additionally, the same subsection requires that, once either or both of those two intentions exist, the possibility must exist that the amended rule "may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state."

Generally speaking, the rule changes impact Chapter 303 in three ways by: 1) reducing the Rio Grande system's arbitrarily determined minimum operating reserve, the impact of which is to reduce waste in the reservoir system and to increase the amount of water available for Class A and Class B water rights holders in times of drought; 2) providing procedures for the maintenance and replenishment of an appropriate operating reserve once reservoir levels fall below a specified minimum amount of acre feet; and 3) clarifying the limits on the ability of the holders of Rio Grande water rights upstream of International Amistad Reservoir to transfer water through the system, or to convert such water rights for use and withdrawal from the reservoirs or downstream from International Amistad Reservoir.

None of these rule amendments are specifically intended to protect the environment or reduce risks to human health from environmental exposure; therefore, none of the amendments meet the definition of "major environmental rule" in Texas Government Code, §2001.0225, and further analysis of impact is unwarranted.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is a modification of a program or regulation that does not affect a recognized interest in private real property, (TWC, §2007.003(b)(5)), and because the government action being taken does not affect an owner's real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the action (TWC, §2007.002(5)(B)(i)).

Among other things, Texas Government Code, §2007.043, Takings Impact Assessment requires: 1) a description of the specific purpose of the adoption; an identification of how the action substantially advances its stated purpose; a description of the burdens imposed on private real property, if any, "...resulting from the proposed use of private real property..." (Texas Government Code, §2007.043(b)(1)(B)); and 2) a determination of whether the action will constitute a taking.

For the purpose of this assessment, the actions being taken constitute the following: changes to required procedures and volumes related to the Rio Grande system's minimum operating reserve; and clarification of the conversion of water rights upstream from the International Amistad Reservoir and the transfer of water rights by owners with unpaid fees. The purpose of the operating reserve is to reduce waste in the reservoir system and to increase the amount of water available for Class A and Class B water rights holders in times of drought. The purpose of the clarification of water rights is to

bring consistency to the rules' application to water rights in the Lower, Middle, and Upper Rio Grande Basins.

With regard to the changes in the operating reserve volume and procedures, these changes do not affect any private real property in any manner that restricts or limits any owner's right to such property that would exist in the absence of these changes. If anything, the reduction of the operating reserve will result in an increase in the likelihood that private rights will be fully satisfied. No private property right exists to water contained in the operating reserve; it cannot be allocated for private use. Thus, these changes do not constitute a taking under Texas Government Code, §2007.002(5)(B)(i).

Because water rights are included in the definition of "private real property" in Texas Government Code, §2007.002(4), the clarification of the right to convert or transfer those water rights requires a more detailed analysis. The adopted rule amendments clarify the conditions under which water from upstream water rights holders could be sent to downstream users. The watermaster has not allowed such a transfer in the past, nor does the watermaster intend to allow such a transfer in the future absent an approved conversion factor or a showing that existing water rights below International Amistad Reservoir will not be impaired because of the uniqueness of the court-adjudicated system of allocation. Likewise, a water rights owner could currently believe that his or her rights may be conveyed prior to all delinquent fees and penalties being paid. Such a belief is contrary to TWC, §11.329(e). Therefore, these amendments do not affect an owner's real property in a manner which restricts or limits the owner's right to the property that would otherwise exist in the absence of the rulemaking.

The TWC, §11.122(a), Amendments to Water Rights Required, requires that holders of permits, certified filings, and certificates of adjudication “shall obtain from the commission, authority to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right.” The Austin Court of Civil Appeals held that these limitations on water rights do not constitute a taking. *Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674 (Tex.Civ.App.–Austin 1947). Thus, a holder of water rights in the upper regions of the Rio Grande has a defined right to divert a specific volume of water from a specific diversion point and use that water for a specific authorized purpose. However, the holder *does not* have an absolute right to change the point of diversion or the purpose of use because the possibility exists that an amendment for the purpose of making such changes would not be granted. Under TWC, §11.134, water rights amendments are not authorized if other water rights would be impaired. No amendments to transfer Upper Rio Grande rights to Middle or Lower Rio Grande rights have ever been granted. The granting of such amendments would require complicated calculations in order to ensure that other rights would not be affected. No conversion factors currently exist for volumes of water transferred into the system. Such conversion factors would have to be formulated to determine the amount of water that could be diverted hundreds of miles downstream. The reality is that the Amistad/Falcon system is already a fully allocated administratively-closed system and the introduction of new water rights into the system may be very difficult to accomplish without impairing existing rights to water already allocated within the system. The commission would only consider granting such a transfer if it had a workable approved conversion factor and a showing that no water rights in the system would be impaired.

In summary, the rule changes do not constitute a taking. The changes related to the operating reserve pertain to water owned by the State of Texas. The clarification related to Upper Rio Grande water rights is not a taking because there is no absolute right to transfer this water without the express approval of both the Rio Grande Watermaster and the commission. No mechanism currently exists for calculating either the reduction of water volume from upstream through the administratively-closed and fully-allocated system or for measuring the extent of impairment of existing allocated water rights.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC, §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC, §505.11(a)(6). Therefore, the adopted rule amendments are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on this proposal was held in Harlingen on February 23, 2001, at 2:00 p.m. at the commission's regional office located at 1804 West Jefferson Avenue. A Spanish translator was provided by the commission at the hearing. Five commenters provided oral testimony: Wayne Halbert representing Harlingen Irrigation District, Rio Grande Watermaster Advisory Committee, Lower Rio Grande Valley Water District Managers Association, and Texas Irrigation Council (Halbert); Gordon R. Hill representing Bayview Irrigation District Number 11 (Hill); Charles Browning representing DMI users, the Region M Water Planning Group, and North Alamo Water Service Company (Browning);

Max Phillips representing Delta Lake Irrigation District (Phillips); and Ray Prewett representing DMI users and Texas Citrus Mutual (Prewett).

The public comment period closed at 5:00 p.m., February 26, 2001. Two commenters provided written comments: Hidalgo and Cameron Counties Irrigation District No. 9 (I.D. No. 9), and the Rio Grande Watermaster Advisory Committee (WAC).

RESPONSE TO COMMENTS

All five commenters who presented oral testimony supported the rule changes and urged the commission to adopt the rules as proposed. Both written commenters supported the proposed amendments to the rules. No commenters expressed opposition to the proposed amendments.

The commission appreciates the support for these rule amendments.

The WAC stated that the executive director of the commission established the Rio Grande Watermaster Committee (Committee) which is composed of 15 members who are water rights holders or representatives of water rights holders representing the different types of water rights throughout the entire Rio Grande Watermaster jurisdiction. The WAC also stated that the Committee has been actively involved in the planning, study, and review of the proposed amendments. The members of the WAC recommended that the commission adopt the proposed amendments to Chapter 303 as presented at the public hearing on February 23, 2001, at the Rio Grande Watermaster Office, Harlingen, Texas.

The commission agrees with this comment and appreciates the support of the WAC for these rule amendments.

Concerning §303.21(b)(2), I.D. No. 9 stated that they strongly support the proposed rule change on the amount of water to be held in the operational reserve pool. I.D. No. 9 also stated that historical data conclusively shows that the present operational reserves have been too high, and this rule change will allow excess water to be available for beneficial uses.

The commission agrees with this comment and appreciates the support of I.D. No. 9 for these rule amendments.

STATUTORY AUTHORITY

Chapter 303 applies to water rights in portions of the Rio Grande Basin and portions of the Nueces - Rio Grande Coastal Basin. Chapter 303 establishes the regulatory functions of the watermaster in these basins. The amendment is adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §§11.325 - 11.458, which establish the duties of the watermaster. For additional legal authority, refer to *State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex.Civ.App.-Corpus Christi 1969).

SUBCHAPTER A: INTRODUCTORY PROVISIONS

§303.2

§303.2. Definitions.

The following words and terms when used in this chapter shall have the following meanings.

(1) **Account** - The record of municipal and operating reserves; or the record of an allottee's water in storage in the Amistad-Falcon system, and the diversion of such water.

(2) **Accounting period** - From the last Saturday of a month at midnight to the last Saturday of the following month at midnight.

(3) **Agent** - A person designated by a water right holder to have the authority to request certification to divert, make diversions, and/or pay assessment charges.

(4) **Allocation** - The distribution of the United States' share of water stored in the Amistad-Falcon system to the various accounts.

(5) **Allottee** - A water right holder who has an account and who has the right to call on releases of water from the associated accounts.

(6) **Assessment** - The authorized charges against water rights holders levied by the commission to finance watermaster operations.

(7) **Certification** - Written authorization issued by the watermaster to divert water from the Rio Grande or its tributaries for a specific period of time.

(8) **Diversion facility** - Any pump, canal system, or other device.

(9) **Diverter** - A water right holder, an agent, or an exempt domestic and livestock user who takes water from the Rio Grande or its tributaries.

(10) **Hydroelectric rights** - A water right that authorizes the use of available flow for hydroelectric power generation. No account will be established for the holders of hydroelectric rights.

(11) **Lower Rio Grande Valley** - That portion of the Rio Grande Basin, including tributaries, in Texas from Falcon Dam downstream to the Gulf of Mexico, including that portion of the Nueces-Rio Grande Coastal Basin located in Starr, Hidalgo, Willacy, and Cameron Counties, Texas, whose source of water is the Rio Grande.

(A) Reach I is that portion of the Lower Rio Grande between Falcon Dam and the International Boundary and Water Commission streamflow gage at Fort Ringgold.

(B) Reach II is that portion of the Lower Rio Grande between the International Boundary and Water Commission streamflow gage at Fort Ringgold and Anzalduas Dam.

(C) Reach III is that portion of the Lower Rio Grande between Anzalduas Dam and the Progreso Bridge.

(D) Reach IV is that portion of the Lower Rio Grande between the Progreso Bridge and the International Boundary and Water Commission streamflow gage near San Benito.

(E) Reach V is that portion of the Lower Rio Grande between the International Boundary and Water Commission streamflow gage near San Benito and the Cameron County Water Control and Improvement District 6 river pumps.

(F) Reach VI is that portion of the Lower Rio Grande between Cameron County Water Control and Improvement District 6 river pumps and the International Boundary Commission streamflow gage near Brownsville.

(G) Reach VII is that portion of the Lower Rio Grande between the International Boundary and Water Commission streamflow gage near Brownsville and the Gulf of Mexico.

(12) **Measuring device** - A device designed to indicate flow rate and amount, with instantaneous readout in cubic feet per second (cfs) or gallons per minute (gpm) and a flow totalizer with a readout in acre-feet or gallons, to be accurate within 5.0%, said device to be approved by the watermaster. Any device operated and maintained by the International Boundary and Water Commission is considered satisfactory. On tributaries, any device approved by the watermaster is sufficient.

(13) **Middle Rio Grande** - That portion of the Rio Grande Basin including tributaries, in Texas upstream from Falcon Dam to Amistad Dam.

(A) Reach I is that portion of the Middle Rio Grande between Amistad Dam and the International Bridge at Del Rio.

(B) Reach II is that portion of the Middle Rio Grande between the International Bridge at Del Rio and the International Bridge at Eagle Pass.

(C) Reach III is that portion of the Middle Rio Grande between the International Bridge at Eagle Pass and the International Boundary and Water Commission streamflow gaging station at San Antonio Crossing.

(D) Reach IV is that portion of the Middle Rio Grande between the International Boundary and Water Commission streamflow gaging station at San Antonio Crossing and the International Bridge at Laredo.

(E) Reach V is that portion of the Middle Rio Grande between the International Bridge at Laredo and San Ygnacio.

(F) Reach VI is that portion of the Middle Rio Grande between San Ygnacio and Falcon Dam.

(14) **No charge water** - Storm and flood water in the Rio Grande downstream from Amistad Dam that is designated by the watermaster, in accordance with the Texas Water Code, §11.0871, and with Texas Water Commission order dated August 4, 1981, and any subsequent orders, as being available for diversion and use by water rights holders.

(15) **Nondiverter** - An agent or a water right holder who has water delivered to him by a diverter.

(16) **Proration period** - The period determined on a monthly basis, when the United States' share of water in the Amistad-Falcon system is less than 50% of the total United States conservation storage.

(17) **Pump operation report** - That part of the certification which the diverter returns to the watermaster after recording the amount of water actually diverted during the certification period.

(18) **Travel time** - The time for released water to travel downstream to designated reaches on the Middle or Lower Rio Grande.

(19) **Tributary diverter** - A water right holder, an agent, or an exempt domestic and livestock user on the Rio Grande below Fort Quitman and above Amistad Reservoir or on a tributary of the Rio Grande with no right to call for releases from Amistad or Falcon Reservoirs.

(20) **Upper Rio Grande** - That portion of the Rio Grande Basin, including tributaries, in Texas from Amistad dam upstream to Fort Quitman, excluding the Pecos and Devils watersheds.

(21) **Usable balance** - The quantity of water in acre-feet an allottee has available for use, and is based upon whichever is less:

(A) the sum of allottee's annual authorized amount of water minus actual use for the year to date, plus the allottee's contract water balance; or

(B) the amount in the allottee's storage account.

(22) **Water right** - A right acquired under the laws of the state to impound, divert, and/or use water.

(A) Class A water right - A water right in the Lower or Middle Rio Grande Basin designated as a Class A right and held under a certificate of adjudication, granted in the Adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.), or issued by the commission. If converted to a domestic, municipal, and industrial (DMI) water right, a Class A water right is converted to 50% of the existing water right.

(B) Class B water right - A water right in the Lower or Middle Rio Grande Basin designated as a Class B right and held under a certificate of adjudication, granted in the Adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.), or issued by the commission. If converted to a DMI water right, a Class B water right is converted to 40% of the existing water right.

(23) **Water right holder** - One who owns a water right.

SUBCHAPTER C: ALLOCATION AND DISTRIBUTION OF WATERS

§303.21, §331.22

STATUTORY AUTHORITY

Chapter 303 applies to water rights in portions of the Rio Grande Basin and portions of the Nueces - Rio Grande Coastal Basin. Chapter 303 establishes the regulatory functions of the watermaster in these basins. The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §§11.325 - 11.458, which establish the duties of the watermaster. For additional legal authority, refer to *State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex.Civ.App.-Corpus Christi 1969).

§303.21. Accounts - Amistad/Falcon Reservoirs.

(a) For the purpose of establishing accounts in Amistad and Falcon Reservoirs, the two reservoirs are considered to constitute a single storage system. Accounts in the Lower and Middle Rio Grande are based upon a water right's annual authorization in acre-feet. Water rights for irrigation and mining purposes are considered as having irrigation priority rights and therefore are included in the irrigation accounting system.

(b) When there is adequate water to do so, the watermaster shall maintain the following accounts:

(1) a reserve of 225,000 acre-feet of water for domestic, municipal, and industrial uses;

(2) an operating reserve of 75,000 acre feet; and

(3) the accounts for irrigation uses and all other uses.

(c) The operating reserve is necessary to cover losses of water charged to the United States. These losses are the result of seepage, evaporation, and conveyance; emergency requirements; and adjustments of amounts in storage as may be necessary by finalization of provisional computations by the International Boundary and Water Commission.

§303.22. Allocations to Accounts.

(a) Allocations shall be based on water in the usable storage of Falcon and Amistad Reservoirs. Such storage shall be computed as the total storage in Amistad and Falcon Reservoirs as reported by the International Boundary and Water Commission on the last Saturday of each month, less the amount of water in dead storage, which is water behind the dams that cannot be released due to hydrologic

restrictions. To determine the amount of water to be allocated to the various accounts, computations shall be made in the following sequence:

(1) from the amount of water in usable storage, deduct 225,000 acre-feet to re-establish the reserve for municipal, domestic, and industrial uses;

(2) from the remaining storage, deduct the total end-of-month account balances for all Lower and Middle Rio Grande irrigation and mining allottees;

(3) from the remaining storage, deduct 75,000 acre feet for the operating reserve;

(4) after the deduction of the operating reserve, the remaining water will be allocated to the Class A and Class B accounts.

(b) The water available for allotment after the deductions under subsection (a) of this section, shall be divided into Class A and Class B. Class A rights include all Class A water rights in the Lower and Middle Rio Grande Basins, as defined in §303.2(22)(A) of this title (relating to Definitions); Class B rights include all Class B water rights in the Lower and Middle Rio Grande Basins, as defined in §303.2(22)(B) of this title. Class A allottees shall receive 1.7 times as much water as that allotted to Class B allottees.

(c) Allottees who do not put any of the water in their account to beneficial use within two consecutive calendar years shall have that account reduced to zero. No subsequent allocations will be made until the allottee advises the watermaster that water is expected to be used.

(d) At no time shall the watermaster allow an allottee to accumulate in storage more than 1.41 times the annual authorized right in acre-feet.

(e) No allocation will be made to a water right holder when the water right or a portion of the right does not identify a specific place or places of use. Only that portion of a water right which authorizes a specific place of use will receive an allocation based upon the number of acre-feet recognized to be used on that tract.

(f) If the amount of usable water is insufficient to carry out all the steps specified in subsections (a) and (b) of this section, the computations will be made in the specified sequence, with the following adjustments.

(1) If the watermaster determines there is insufficient water for allocation under subsection (b) of this section or other valid reasons for not allocating the available water, the unallocated storage after subsection (a)(3) of this section will be held for the next allocation period. In general, water will be allocated under subsection (b) of this section when there is at least 50,000 acre-feet available for that purpose.

(2) The watermaster may not allocate water to Class A and Class B water rights users until the operating reserve is at or above 75,000 acre feet.

(3) If the balance available for the operating reserve is less than 75,000 acre-feet, but greater than zero acre-feet, then that amount will be the amount allocated to the operating reserve. If the operating reserve is less than zero acre-feet, the watermaster will deduct from the Class A and Class B accounts, via negative allocations, the amount necessary to provide 48,000 acre-feet for the operating reserve account. A negative allocation will be made on a pro rata basis, from all Class A and Class B accounts containing water at the time, based on the amount of water in such accounts. The watermaster will keep accurate records of the negative allocations affecting each Class A and Class B account. When the operating reserve has been restored to 48,000 acre feet, negative allocations will cease. When the operating reserve has been restored to 75,000 acre feet, and sufficient water is available, all accounts from which water has been deducted will be restored to the amount of water in each account prior to the negative allocation period and any new allotments will be made in accordance with subsections (a) and (b) of this section.

(g) For each month of a proration period, the total amount of water authorized to be used for that calendar year by each of the four water rights listed in the following table will be incrementally reduced or restored in the following manner. When the United States' share of storage in the Amistad-Falcon system is less than 50% of its total storage capacity, each 1.0% drop or rise in reservoir storage will reduce or increase the unprorated annual authorization by a corresponding amount listed under proration reduction in the following table. Once the prorated annual authorization has been

reached, no further reductions will be made. During any month in which proration has been in effect, any allocation for the listed water rights will be based on the reduced unprorated annual amount. When conditions are such that it appears that the initiation of a proration period is imminent, the watermaster shall, at least two months in advance, advise the four affected water right holders of the anticipated proration.

Figure: 30 TAC §303.22(g)

Certificate of Adjudication	Annual Authorization (Acre-feet) - Unprorated	Annual Authorization (Acre-feet) - Prorated	Proration Reduction (Acre-feet)
23-802	33,948.85	20,000.00	1,162.40
23-837	4,375.00	3,656.00	59.90
23-850	3,750.00	2,000.00	145.80
23-851	2,522.50	1,642.00	73.40

(h) The watermaster may take any actions appropriate to prevent the waste of water or to alleviate emergencies.

SUBCHAPTER E: AMENDMENTS TO AND SALES OF WATER RIGHTS

§303.41, §331.42

STATUTORY AUTHORITY

Chapter 303 applies to water rights in portions of the Rio Grande Basin and portions of the Nueces - Rio Grande Coastal Basin. Chapter 303 establishes the regulatory functions of the watermaster in these basins. The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §§11.325 - 11.458, which establish the duties of the watermaster. For additional legal authority, refer to *State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*, 443 S.W.2d 728 (Tex.Civ.App.-Corpus Christi 1969).

§303.41. Sale of Water Rights.

(a) The owner of a water right may convey his water right as provided by §297.81 of this title (relating to General Rules of Conveyance) and §297.82 of this title (relating to Duty to Inform Executive Director), after all outstanding fees, penalties, and interest, if any, as provided by §303.71 and §303.73 of this title (relating to Costs of Administration; and Assessment of Costs) are paid. The purpose and place of use shall not be changed without authorization from the commission. Owners of water rights shall promptly inform both the executive director and the watermaster of any transfers of

water rights. The new owner must file with the executive director all required documents as identified in §297.83 of this title (relating to Recording Conveyances of Water Rights).

(b) If a tract of land to which a smaller water right acreage is appurtenant is owned by more than one person in divided interests, a water right partition agreement is required among all the owners of said tract of land before any one of the owners can be authorized by the watermaster to divert water. However, if the owners fail to submit a water right partition agreement within one month after being notified by the executive director that such an agreement is needed, the executive director shall administratively divide the water rights among the owners on a prorata basis by acreage. The owners involved may request that the executive director grant an extension of the one-month deadline, not to exceed six months, if extenuating circumstances exist. If the executive director does not grant the extension, the division will be made on a prorata basis. The executive director will recognize the prorata shares until changes are made by valid partition agreement.

§303.42. Amendments.

The commission will consider applications to amend water rights.

(1) An applicant shall submit to the executive director an application prepared to reflect the desired change(s) and executed as provided in these sections. Applications must meet all of the requirements for an original water permit as set out in Chapter 295 of this title (relating to Water Rights, Procedural) and Chapter 297 of this title (relating to Water Rights, Substantive).

(2) Determination of the type of notice required will be made by evaluating the applications according to §295.158 of this title (relating to Notice of Amendments to Water Rights). One exception to this is that changes in the purpose of use, rate of diversion, point of diversion, and place of use for water rights held in and transferred within and between the mainstems of the Lower Rio Grande, Middle Rio Grande, and Amistad Reservoir will not require mailed and published notice.

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

(4) Transfers of the point of diversion or place of use of water rights from the Upper Rio Grande into the Middle and Lower Rio Grande below International Amistad Reservoir will be prohibited unless:

(A) an applicable conversion factor has been approved by the commission;

(B) the commission finds that the transfer would not impair other water rights within the Middle and Lower Rio Grande; and

(C) the commission finds that the transfer would not reduce the amount of water available for allocation.