ACTIVE WATER RESOURCES MANAGEMENT: A LEGAL PERSPECTIVE

presented at Texas Commission on Environmental Quality Environmental Trade Fair & Conference, Austin, TX

Glenn Jarvis, Esq.

April 2008

TABLE OF CONTENTS

I. INTRODUCTION

"Active water resource management" is a term used to describe a state's active involvement on a day to day basis in the management and enforcement of adjudicated water rights or claims to water rights in the state.

The need for active water resource management and enforcement of water rights has come about because it was believed in the past that in arid and semi-arid areas where available water supply is of short supply that the prior appropriation doctrine with its "first in time, first in right" principle would provide security and protection to those having or obtaining the right to use water through recognized claims, grants or permits from the state. This was the case also where common law riparian rights were given recognition to some extent. In the event of water shortage, the older or senior water right holder had protection by a "seniority call" to have less senior or junior water rights up stream from them cease pumping so that available water could flow down the stream to the senior water rights holder's diversion point to meet his or her water needs. This worked in small river systems with a relatively few water rights holders, but as more and more water rights were obtained in large rivers and on their tributaries, in the real world this one on one self enforcement mechanism is not effective. More active third party intervention is required to provide protection and enforcement of water rights, if a water right is to have reliability and value. At this time, the required intervention is by the State.

For example, in New Mexico, the State Engineer is charged with this responsibility, *New Mexico Statute Annotated* (NMSA) Water Code, 1978 Section 72-2-9, and Section 72-2-91, adopted in 2003 provided:

> Priority administration; expedited water marketing and leasing; state engineer.
>
> A. The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compact is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.
> B. The state engineer shall adopt rules for priority administration to ensure that authority is exercised:
> (1) so as not to interfere with a future or pending adjudication;
> (2) so as to create no impairment of water rights, other than what is required to enforce priorities; and
> (3) so as to create no increased depletions.
> C. The state engineer shall adopt rules based on the appropriate hydrologic models to promote expedited marketing and leasing of water in those areas affected by priority administration. The rules shall be consistent with the rights, remedies and criteria established by law for proceedings for water use leasing and for changes in point of diversion, place of use and purpose of use of water rights. The rules shall not apply to acequias or community ditches or to water rights served by an acequia or community ditch.
> D. Nothing in this section shall affect the partial final decree and settlement agreement as may be entered in the Carlsbad irrigation district project offer phase of

State of New Mexico ex rel. State Engineer v. Lewis, et al., Nos. 20294 and 2260 (N.M. 5th Jud. Dist.).

This endeavor in New Mexico is not being implemented without controversy where current litigation is testing the State Engineer's implementation of rules and regulations. *See, Lower Rio Grande Active Water Resource Management Regulations,* Tessa T. Davidson, Law of the Rio Grande Conference, CLE International (January 24, 2008).

Active Water Resource Management by the State has a long history in Texas at least in parts of the State, but has not been applied over the whole State or by special courts having specialized knowledge in water rights issues as is the case in some states like Colorado.

It has become apparent in Texas with growing water needs and with sources of water supply not always located where the need is located, coupled with over appropriation of some streams, that is, more water rights than available water supplies during times of water shortages that there needs to be mechanisms available to transfer and market water rights to meet these needs. Enforcement and management of water rights is critical to transferring water rights in order to give one acquiring water rights the security that the rights will be enforced and managed by a governmental authority having legal enforcement powers.

In the early 1900s in Texas, the Legislature recognized that in order to provide irrigation development, which was important at that time, that private water development companies would be necessary. In 1904 and in the 1917 Conservation Constitutional Amendment the public authorized the Legislature to establish local governmental entities such as water district and river authorities to develop and manage the water resources of the State in order to encourage irrigation which was the main economic development source at that time. Early irrigation acts were passed in 1889 and 1895 implementing the prior appropriation doctrine to the State while continuing to recognize riparian rights. These laws were followed by legislation in 1913, 1917, and 1918.

After many conflicts in the courts dealing with enforcement of water rights, it was decided that it was first necessary to quantify all of the water rights in the State, and provide for enforcement mechanisms. This was accomplished by the Water Rights Adjudication Act of 1967 which was a result of judicial experiences in attempting to enforce water rights in court cases between individual water rights holders and properly manage and protect their interests in the courts. This paper will discuss this development of what is now known as "active water resource management" as it has developed in the State. This development has been encouraged by natural events through the years of droughts and floods, which normally focuses public attention on the need to "manage" the State's natural water resource. As it turned out, it was a court case which started this process.

II. EARLY EXPERIENCE IN THE COURTS

After experience with legislatively created private water entities, irrigation companies designed to develop and manage the water resources, did not work well, enforcement of water rights was to be accomplished by water districts and river authorities authorized by the 1904 and 1917 Constitutional amendments. However, disputes arose between these districts and between individual water rights holders in exercising their water rights.

Water right holders had to rely upon the courts to resolve their disputes. This was a very awkward process. It required injunction lawsuits, so that a court could exercise its equitable powers in attempting to resolve conflicts. A court could only resolve disputes between individual parties in the litigation without taking into account the impact of such litigation on other water right holders on a stream, or segment of a stream. The process also placed the courts in the difficult position of deciding technical hydrologic and water management questions without the aid of relevant hydrologic evidence.

An example of these difficulties was an early water dispute after the early Irrigation Acts of 1889 and 1895 and before the later 1913 Act. In *Biggs v. Miller*, 147 S.W. 632 (Tex.Civ.App. B El Paso 1912) users of water from the Pecos River through one irrigation system called the "Barstow System" sought to enjoin other users in another irrigation system called the "Biggs System." Both parties claimed prior appropriation rights and riparian rights to riparian lands. The claimants sought to use an injunction to divide the waters of the stream in accordance with the parties' respective water rights.

A prior Federal Court judgment had adjudicated to the Barstow system, whose diversion point was below the Biggs System, the prior right to use water for irrigation purposes on both riparian and non-riparian lands. That judgment ruled that the more junior Biggs System was subject to such rights as to irrigating non-riparian but not its riparian lands.

The court was faced with a complex record pertaining to the capacity of canals to handle water; whether rights were restricted to then cultivated land, or could include irrigable land that could later be brought under cultivation; how much water was needed to irrigate the land without waste; the capabilities of the irrigation system's headgates and other facilities; and rights to return flows. The court was also faced with procedural and party issues as to whether all users in each of the systems were necessary parties for the adjudication of the rights as to each system.

Because the suit was for an injunction, an equitable remedy could be applied. The trial court divided the flows in a detailed, practical manner distinguishing between appropriative rights to non-riparian lands and riparian rights to riparian lands, recognizing and consistent with the dual system of water rights. The court recognized the appropriative rights under 1895 Act, and riparian rights as to riparian lands, by declaring: "By our statutes, the water of such rivers as the Pecos are property of the public. Riparian owners have easements therein, which cannot be divested, say, perhaps, by condemnation. But statutory appropriations, when filed in compliance with law, give to such appropriators the right to take the water to non-riparian lands, there to use it for themselves or to dispose it to water consumers." 147 S.W. 632 at 635. The court disagreed with some of the equitable findings of the trial court and found procedural errors, and reversed the case for further proceedings. No resolution was achieved, and no further judicial history is available on the case.

Pending at the same time before the same court was *Biggs v. Lee*, 147 S.W. 709 (Tex.Civ.App. – El Paso, 1912), which involved a Pecos River riparian water rights claimant's action against an upstream appropriator seeking to enjoin him from diverting water to be used on non-riparian land. The District court's action enjoining the appropriator claimant from diverting water was reversed and remanded on appeal, without resolving the controversy.

The appellate court, on motion for rehearing, provided guidance to the District court:

> It is certain that under our laws the waters are the property of the public, subject to the easements of riparian owners. The riparian easement is the right to use an amount of water reasonably sufficient for domestic and stock-raising purposes and for irrigating the riparian lands. A statutory appropriation, under our decisions, is effective as against the waters so the property of the public, subject to the easements of the riparian owners which have the prior right.
>
> If the water is sufficient only for riparian owners using it, it must be equitably divided between them. As between the riparian owners and the statutory appropriator, the riparian owners must first have water reasonably sufficient, as indicated; but as against the excess the statutory appropriation is effective. To hold that riparian owners have the right to have all the water flow past their land as against statutory appropriations would be to destroy the appropriation statute in its entirety, for there are riparian owners on every stream, and if each had the right as against the appropriator system anywhere. We refused to decide in the original opinion whether an appropriation is good against the water until such time as the riparian owner shall make use of it; but, as here illustrated, we very strongly incline to the opinion that this will be found to be the law. Every stream is bordered by riparian lands, even the Mississippi River, the largest stream we have. If every riparian owner had the right to have all the water, as against appropriators, flow past his land, no valid appropriation could ever be made. Again, if as we have held the riparian owner's only right is to use sufficient water for his land's purposes, still it would follow, if his right was good against appropriations, before he made use of the water, that on small streams the appropriation statute would be nullified. On the other hand, if the law is that the riparian owner can only use sufficient for his land's purposes, and if the law is that he only had the preferential right when he uses it or when in good faith he is about to use it, then there has been preserved the statutory appropriation, without it, will be noted, injuring the riparian owner; for if the water is sufficient only for the riparian owners using it, there can be no valid appropriation. If there is an excess over what the riparian owners using it need, then as to the excess the appropriation is valid. If there is a stream where none of the riparian owners care to use the water, and which flows only a small quantity, it may nevertheless be used by the appropriator, subject always to the prior right of the riparian owner to the extent of his needs.
>
> We think, however, that the point made by appellee is well taken. The riparian owner in this case is entitled to sufficient water for his land's purposes. This necessarily means sufficient usable water, and it would be proper for a decree, if he shows himself entitled to one, to award sufficient water so as to avoid the mineral impregnation; but, having ascertained the amount, as may be done, the judgment should certainly and definitely fix the same so as to make it intelligible and capable of enforcement.

The Court offered many legal observations, but little help on how to apply them in a practical sense to ensure real time and long range management. These cases illustrate the many complex issues arising (a) in interpreting and enforcing individual water rights claimants both appropriative and riparian rights; (b) against a number of parties in a single litigation without joinder of all water rights claimants on the stream or segment of a stream; and (c) without the benefit of technical definition of rates of flow, system capacities, and other relevant hydrologic evidence. *See*, also, for later litigation on the *Pecos, Water County Improvement District No. 2 v. Water County Irrigation District No. 1, et. al.*, 214 S.W. 490 (Tex.Civ.App. – El Paso, 1919); *Hoefs vs. Short*, 114 Tex. 501, 510, 278 S.W. 785 (Tex.Sup.Ct. 1925); *Ward County Water Improvement District No. 3, et. al. v. Ward County Irrigation District No. 1, et al.*, 237 S.W. 584 (Tex.Civ.App. – El Paso 1922, writ granted, ref'd and aff'd, 117 Tex. 10, 295 S.W. 917 (Tex. 1927); *William v. Reeves County Water Improvement Dist. No. 1*, 256 S.W. 346 (Tex.Civ.App. – El Paso, 1923). The relative rights on the Pecos were never fully resolved until later adjudication under the Water Rights Adjudication Act of 1967. See, also, *Borden v. Trespalacios Rice & Irr. Co.*, 86 S.W. 86 (Tex.Sup.Ct. 1905); *City of Wichita Falls v. Bruner*, 191 S.W.2d 912 (Tex.Civ.App. – Ft. Worth, 1945); King, Neal, *AInadequacies of Existing Texas Procedure for Determination of Water Rights on Major Stream Segments*, Proc. Water Law Conference, Univ. of Texas, pgs 66-73 (1956).

In 1926, the Texas Supreme Court in *Motl, et. al. v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926) analyzed, in depth, the development of water law in Texas up to that time. Simply stated, this case was brought by a riparian claimant to irrigation rights seeking to pump water from a small reservoir built and developed by an appropriator under a filing made under the 1889 Act. The riparian claimant's application for a permit was denied by the Board of Water Engineers; but, the riparian continued to pump water from the reservoir. The reservoir owner sued seeking to enjoin the riparian from diverting water. Although this case was later reversed on other grounds dealing with the nature of the riparian right, it is still an instructive case with respect to the practical result reached by the Court on the facts of the case.

In this case, the appropriator contended that the riparian right, on a natural or statutory navigable stream, only extended to domestic stock and household uses and rights for other uses had to be obtained by statutory appropriation. The Court was urged to declare that riparian rights do not exist on natural or statutory navigable streams. Thus, the Court was confronted with important water law issues at the time.

After an extensive analysis of Mexican laws, laws of the Republic, and later legislative acts, the Court concluded that a riparian owner had the right implied in the original grant of land, to use water ". . not only for his domestic and household use, but for irrigation as well." 286 S.W. 458 at 467, citing *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733; *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301; *Martin v. Burr*, 111 Tex. 228 S.W.543. This conclusion was reversed some 30 years later with respect to riparian land in some Spanish land grants in the *Valmont* case later discussed.

Having held that a riparian right to irrigation existed in this case, the Court recognized that a riparian right only attached to the ordinary and normal flow of a stream, not to flood waters. The Court felt compelled to legally define the water to which a riparian is entitled. The Court's opinion was ". . . that riparian waters are the waters of the ordinary flow and underflow of the stream, and that the waters of the stream, when they rise above the line of the highest

ordinary flow, are to be regarded as flood waters or waters to which riparian rights do not attach . . . . The line of highest ordinary flow is the highest line of flow which the stream reached and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal, and usual condition, uninfluenced by recent rainfall or surface run-off." 286 S.W. 286, at 468-469. In applying this legal definition of flows, the Court affirmed a judgment enjoining the riparian from pumping from a reservoir, *except when water was running over the appropriator's dam.* This result, from a practical standpoint, (1) allowed the appropriator to take as much water as desired, whether the water was "ordinary" or "flood" flow; (2) only allowed the riparian to pump water when the reservoir was full and overflowing; and (3) regardless of the amount of "ordinary" flow in the stream available to the riparian at a particular point in time, it could not be taken if the water is needed to fill the reservoir, even if the appropriator is pumping at the same time!

Another illustrative case is *Humphreys-Mexia Co. v. Arseneaux*, 116 Tex. 603, 297 S.W. 225, (Tex.Sup.Ct. June 22, 1927). This suit sought to enjoin the Defendants from pumping, drawing off, diverting, selling, or otherwise, disposing of water from a certain reservoir made by dame across the Navasota River constructed by the Plaintiff. The Defendant owned all of the riparian rights to the land for the water impounded by the Plaintiffs' dam(s). The Defendants installed a pump on the river to divert water from impounded water constructed by the Plaintiffs, and sold it to other oil well drilling companies in the Mexia field. The Defendants claimed the rights to divert this water by virtue of their riparian rights to the land adjoining the stream. On the other hand, the Plaintiff had obtained a permit to impound waters from the river on one of the dam(s) involved which the court held was to impound floodwaters. The Plaintiff contended that the Defendants did not have the right under their riparian rights to divert water from the impounded water and deliver it to non-riparian land.

The court noted that the Plaintiff's permit only authorized it to impound public waters of the State consisting of storm and flood waters of the Navasota River, and expressly prohibited it from impounding any part of the normal flow of the Navasota River. The Plaintiffs also constructed other dam(s) which backed-up water onto the land of other riparian owners. The court, relying on cases recognizing riparian rights, trespass laws, and statutory appropriation rights, and a very complicated set of facts, determined that the injunction to prohibit the diversion of waters from the water in the flood pool would be a continuous legal wrong and trespass without just compensation, and therefore denied the injunction. This case illustrates the complicated nature of the construction of dam(s) by an appropriator faced with riparian water rights claims and how a court sitting in equity must determine the appropriate result. The case, in essence, denied the rights of the appropriator while recognizing assertable claims by riparian(s), but the result did not provide guidance to water right holders attempting to enforce their water rights.

These cases illustrate the difficulties encountered in the courts when water rights claimants sought court enforcement of their rights. These cases were often cited as declaring the existing water law at the time after the 1913-1925 Acts, but still there was frustration and confusion among water rights claimants in efforts to enforce and protect their claims in a practical sense. This was the case, even though the courts could use their equitable powers to resolve disputes. This condition of affairs existed until the 1950s when the State experienced the drought of record. This act of nature brought forth litigation on the Lower Rio Grande watershed when a district court faced with the drought in the 1950s, and many competing claims to water courageously extended its equitable powers to

manage water use while water rights claims could be determined (adjudicated) and enforced. The Court took judicial custody of water in a federally constructed reservoir on the Rio Grande (Falcon Reservoir), and appointed a "Master" in Chancery to administer the available water to all of the water claimants. This judicial act, setting as an "equity common law" court was later enforced by the courts and the Legislature.

III. STATE, ET. AL. V. HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 18, ET. AL.

State of Texas, et. al. v. Hidalgo County Water Control and Improvement District No. 18, et. al., 443 S.W.2d 728 (Tex.Civ.App. – Corpus Christi March 27, 1969, writ ref'd n.r.e., December 9, 1970), often referred to as the "*Valley Water case*." The experience of the *Valley Water case* emphasized the need for more efficient water rights adjudication. However, since this case was an injunction case, as in earlier courts, the court was setting as a court of equity, and had jurisdiction to do equity as opposed to law only. In this manner, the court was able to equitably adjust the results of the case. This was the first adjudication in court among all water rights claimants in an independent segment of a stream, *i.e*., that portion of the Lower Rio Grande downstream of Falcon Reservoir. It arose during the drought in the 1950's and took over 30 years to decide. It involved roughly 3,000 parties, all potentially adverse to each other, and cost in the 1950 - 60s an estimated $10 million in court costs and attorney fees. *Texas Water Rights Commission: Allocating a Limited Natural Resource for Competing Uses*, 47 Tex. L. Rev. 804, 875 (1969). All of these parties were seeking a right to a limited supply of water.

After a while, in the initial court proceeding, realizing the contradictory and incompatibility issues brought about the dual system of water rights, *i.e*., between the appropriation law and riparian claims, the riparian water rights claims were severed from the suit and tried as a separate lawsuit to final judgment in the *Valmont Plantations* case. In the *Valmont* case the Texas Supreme Court held that there were no riparian irrigation rights unless expressly granted by sovereign.

Eventually in the judicial proceeding, the State of Texas filed suit to adjudicate all water rights claims in this segment of the Rio Grande. The trial judge took judicial custody of the water in the river segment including Falcon Reservoir, and appointed a watermaster to allocate the available water pursuant to the court's orders. *Hidalgo County W.I. Dist. No. 2 v. Cameron County*, 253 S.W.2d 294 (Tex.Civ.App.) After the *Valmont* decision, the trial court then turned to address appropriative rights. The trial court in addressing appropriative rights and other claims, in its Judgement as modified and affirmed on appeal (1) set aside a water reserve for municipal, industrial, domestic and livestock uses, and (2) recognized two classes of appropriative irrigation rights: first priority for legally established statutory claims under the appropriation system, and a second priority framework for equitable claims. The later category included riparians and others who had been using water in the good faith mistaken belief that they had riparian rights. The court justified its rejection of time priorities by, *inter alia*, observing that the existing appropriative rights in the Lower Rio Grande were to divert from a free flowing stream, which had been transformed to a controlled stream by dams (then, Falcon Reservoir) built by the federal government.

A significant lesson learned during the course of these proceedings by the numerous attorneys involved and the court who devised procedures to accomplish a successful conclusion to

this litigation was that without some mechanism to organize the case from an evidentiary perspective, through required maps, identification of parties and land, that such an adjudication was impossible. The customary evidentiary presentation by each party on an individual basis was meaningless without evidence of the technical overview of the watershed involved. In this case, that role was played by the State's Attorney General and the Texas Water Commission who brought together the necessary tools by which claims could be evaluated, organized, and ultimately adjudicated. Without this assistance the adjudication would not have been possible. The lessons learned stressed the need for a constitutional administrative adjudication process without which it would be extremely difficult, or almost impossible to quantify and adjudicate all the water rights on all of the streams in the State, and provide future enforcement and management by a watermaster program. *See, Smith, the Valley Water Suit* and its impact on Texas Water Policy: *Some Practical Advice for the Future*, 8 Tex. Tech. L. Rev. 577 (1977); Johnson, *Adjudication of Water Rights*, 42 Tex. L. Rev. 121 (1963).

This experience coupled with earlier difficulty in the court cases dealing with disputes between water right claimants, and the need to quantify and define existing water rights in the state led to the passage of a 1967 Adjudication Act.

IV. WATER RIGHTS ADJUDICATION ACT OF 1967

A. Background

The background of the Adjudication Act began with the Irrigation Act of 1917. This Act contained adjudication provisions patterned after the existing "Wyoming" system to adjudicate existing statutory water rights. Implementation of these adjudication provisions was thwarted in 1921 when the Texas Supreme Court held that this statutory procedure was unconstitutional under Constitutional separation of powers principles, *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).

To further illustrate the frustration in the past in coming to the point of active water resource management, the facts of this case is important. In the *McKnight case,* the initial petition was presented to the Board of Water Engineers by a riparian water right claimant in Reeves County who was entitled to receive water from a canal company who claimed rights by appropriation. Notice was published by the Board of Water Engineers of a hearing to be held in Ward County on June 24 - 26, 1918. At the time there was a pending suit in federal court seeking to adjudicate water rights on the Pecos River involving these and other parties, and another suit in district court of Reeves County by Ward County District No. 1 against the Farmers Independent Canal Company to determine relative rights of claimants to waters of the Pecos. None of these pending suits were considered by the Board of Water Engineers, but were pending in court. *See, McKnight v. Pecos and Torah Lake Irrigation Company,* 207 S.W. 599, Tex. Civ. App. (1918).

The *McKnight case* was a separate suit for injunction contending that §§ 105 to 132 of the 1917 Act were unconstitutional. The trial court refused the injunction. On appeal the court of civil appeals granted the injunction. The Supreme Court found that the legislature had undertaken to empower the Board of Water Engineers with judicial power to adjudicate vested water rights, except for domestic and livestock water, which gave the same effect to the Board's determination, when not

appealed from, as is given to judgments of courts of competent jurisdiction, and ruled the adjudication provisions unconstitutional.

Later, in *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (1945), the court recognized that the court in the *McKnight case* was only construing the adjudication provisions of the 1917 Act which were effective June 19, 1917, and did not consider the Conservation Amendment which applied to all natural resources of the State and made them " . . . public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." This case involved an attack on the Railroad Commission's oil and gas as regulatory power to control drilling of oil and gas wells. The Court held that the Conservation Amendment was effective prior to the creation of the Railroad Commission and its grant of authority to regulate the oil and gas industry. In so holding, the Court held that the *McKnight case* was not controlling, and that the separation of powers ruling in *McKnight* to such extent was overruled.

But, the *McKnight* decision emasculated the Board of Water Engineers, which thwarted orderly development and management of the State's surface water resources and created a "desert" in the certainty of surface water law, enforcement and management of water resources for some forty years. Historically, the Board of Water Engineers ceased to function effectively from after 1921 with respect to quantification and management of surface water rights during a period when it was observed by the Texas Supreme Court that water law in Texas " . . . was in a chaotic state . . ." prior to 1967.

A former Attorney General and Governor of Texas sitting as a Federal Judge, commented in 1955 while the *Valley Water case* was in progress, that: "For years it has been a matter of common knowledge that the Texas water laws and decisions are in hopeless confusion; that even if they are as clear as some attorneys profess to believe them, their application and administration would be difficult . . .; that the Board has granted permits on many streams in the State, very few of which have been canceled, in such numbers, and for such quantities, that if riparian rights are given the full effect, practically every drop of water, normal flow, or flood, is 'bespoken'." Federal Judge, James V. Alred in *Martinez v. Maverick County W.C.I.D. No. 1*, 219 F.2d 666, at 670 (5th Cir. 1955). *See, generally,* White and Wilson, *The Flow and Underflow of Motl v. Boyd*, 9 S.W.L.J. 1, 377 (1955).

Following the drought of record which generally prevailed earlier in 1947 in parts of the State, and over the State in 1951-1956 (*See,* Stahle, D.W., and M. K. Cleaveland, 1988: *Texas Drought History Reconstructed and Analyzed from 1698 to 1980. J. Climate*, 1, 59-74, at 66), the Legislature again tried to delegate to the Board of Water Engineers the power to adjudicate water rights. In 1953, while the *Valley Water case* was in process, it enacted a statute then Article 7477 (Article 7477 (§§ 12-13) (Vernon 1953), Acts 1953, 53rd Leg., p. 874, ch. 357, § 1. In these provisions the Board's findings and determinations of water rights would not be final, but the Legislature expressly authorized modifications of the Board's decision by review or appeal of it to a district court for a *trial de novo*. In this manner, the Legislature was trying to circumvent the *McKnight* ruling that, because the Board's findings on water right claims were final without a court appeal, they were, in effect, judicial decisions being made by an agency rather than a court. This legislative effort was also invalidated by the Texas Supreme Court's decision in *Southern Canal Co. v. Texas Board of Water Engineers*, 1956 Tex. 227, 318 S.W.2d 619 (1958).

Again, in 1964, the Texas Water Commission requested the Texas Research League to conduct a study of the operation of the Board of Water Engineers, and recommend changes to more effectively secure development of State's water resources. Vol. I I of the League's study was published February 17, 1965, and dealt with *Water Rights and Water Resource Administration in Texas*. This report was a scholarly dissertation on the problem, and concluded that a water adjudication act was necessary.

A water rights adjudication bill was introduced in 1965 consistent with the Research League study. It followed the "Wyoming" adjudication with appeal from the agency's determination under the substantial evidence rule. It was amended to provide for strict "trial *de novo* appeal", but failed to pass. In 1966, interested water rights groups debated various alternatives (1) a special water court, (2) the Oregon type approach mentioned in the *McKnight* case, and (3) the Wyoming type adjudication act. A modified "Oregon" type water rights adjudication bill was finally agreed upon containing provisions for automatic appeal to court on a trial *de novo* basis. It was an enacted by the 60th Legislature and signed by Governor Connelly on April 13, 1967, *see, In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438 at p. 445.

B. Implementation of the Adjudication Act of 1967

The Adjudication Act, § 11.303, *et. sec.*, Texas Water Code, provided for a statewide process where all water right claimants, except domestic and livestock claims, whether statutory claimants or riparian claimants, had to file sworn claims by September 1, 1969, or July 1, 1971, as to certain riparian claims, § 11.303, Texas Water Code. Non-statutory claims were limited to maximum beneficial use between 1963-1967. The Act declared that it was not to be construed to recognize any water right claim which did not exist before August 28, 1967, and expressly excluded claims for domestic or livestock uses.

The Act addressed the dual system of riparian and appropriation water rights; and was an improvement over previous legislation which addressed only statutory rights. After claims were filed, the Commission began the process of adjudication on a stream or segment of a stream by first completing an Investigative Report by the staff of the Commission which cataloged and described all claims previously filed and mapped by aerial photography the river segment and surrounding areas involved and located all claims of water users on the segment. As the Commission completed its investigation of a stream or segment it sent notice of hearing, and a hearing was held. The Act contains provisions for contests and exceptions to the agency's preliminary determination and finally resulting in a final determination. The final determination was automatically filed in court where the final determination is considered in an appeal in the form of trial *de novo* on issues defined during the administrative process and presented to the court. *See*, Caroom and Elliott, *Water Rights Adjudication - Texas Style*, 44 Tex. B. J. 1183 (1981).

Upon completion of each adjudication case the Commission issued Certificates of Adjudication to all parties recognized a right in the adjudication proceedings. The Certificates evidence the existing water rights in the stream segment that is adjudicated. § 11.322, Tex. Water Code. Permits issued subsequent to an adjudication on a stream segment are now simply added to the records in the Commission as a water right in the State subject to the same regulation as adjudicated rights. Tex. Water Code § 11.336.

The adjudication process under the 1967 Act has now been completed on all streams in the State.

C. Watermaster Provisions of the Act

A significant component of the Water Rights Adjudication Act was that once rights were adjudicated that enforcement of the rights issued be provided in the form of a watermaster. The watermaster provisions are intended to give assurance to those holding adjudicated water rights that their rights will be enforced and protected.

The watermaster concept of enforcement derived from the experiences in the *Valley Water case* discussed above where the court initially took judicial custody of the water in the Lower Rio Grande and appointed a watermaster to allocate and manage the distribution of the available water pursuant to court orders subject to final adjudication of the rights. This system made its way into the Adjudication Act §§ 11.325 -11.333, Tex. Water Code, which allowed the Commission, once rights were adjudicated, to appoint a watermaster to oversee water use and utilize the tools of regulating that use provided in the statute.

V. ACTIVE WATER RESOURCES MANAGEMENT IN TEXAS

These provisions of the Adjudication Act have not been implemented commensurate with the implementation of the adjudication of water rights provided for in the Act. Watermaster programs only exist in some of the watersheds of the State. A program is on the Rio Grande initially implemented by the court in the Valley Water case, and later assigned to the Commission in the final judgment in the case, and later by the Commission in the Middle and Upper Rio Grande adjudication cases.

Later, the South Texas Watermaster program was established on the Colorado, Guadalupe, San Antonio and Nueces Rivers as implemented in the adjudication process. This program was augmented to include the Lavaca and Navidad Rivers which was implemented by a Commission Order based on a Petition of water right holders on those Rivers. Later, this program was extended to the Concho Watershed pursuant to Petitions filed under §§ 11.451, *et. seq.* Texas Water Code, and by special legislation in 2005, in H.B. 2815 adding §§ 11.551-11.560 to the Tex. Water Code which established the Concho River Watermaster Program, *See*, also, *City of San Angelo v. Texas Comm. on Environmental Quality and Concho River Basin Water Conservancy Association* (Cause No. GV4-03796, 53rd Judicial District Court, Travis County, 2005), *City of San Angelo v. Texas Natural Resources Conservation Comm'n*, 92 S.W.3d 624 (Tex.Civ.App. – Austin 2002).

In the rest of the State, local water districts and river authorities enforce their water rights in conjunction with other water rights on the stream. They are assisted by the enforcement capabilities of the TCEQ pursuant to the Texas Water Code applicable to watersheds where Watermaster Programs are not available.

VI. CONCLUSION

Active Water Resource Management has a long history on some of the rivers in the arid portions of the State. But, has not been extended to other rivers of the State because watermaster programs did not follow the adjudication process as was available under the Water Rights Adjudication Act of 1967. This has been dictated by local and regional choice as determined by the TCEQ based upon local desire and needs. As time goes on, it will be up to the public and water rights holders to determine in the future whether their needs in their respective watershed requires Active Water Resource Management and is appropriate for the enforcement and protection of water rights.