Historical Development of Texas Surface Water Law:

Background of the Appropriation and Permitting System and

Management of Surface Water Resources

Understanding the Past leads to understanding of the Present, and better decisions in the Future

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I. Introduction and Overview

Substantial modifications in Texas surface water laws have occurred more frequently than in other aspects of property law. For this reason, the Texas law of surface water rights can best be understood by reviewing its historical evolution. The evolution of surface water law in Texas is unique due substantially to the state's governmental and legal history. Politics always played a significant role motivated by social and historical events and economic considerations, which in turn were often driven by nature. Droughts and water shortages, as

well as floods, often have been followed by changes in water law. This chapter traces that history and its effect on surface water law, culminating in the establishment of the prior appropriation and permitting system in effect today.

Texas was initially governed by Spanish law, then by Mexican law from 1821 until Texas achieved its independence from Mexico in 1836. Texas was a republic and sovereign nation from 1836 until it became a state in 1845. The Republic of Texas utilized the general laws of Mexico until 1840. The Fourth Congress of the Republic of Texas introduced the common law of England as of March 16, 1840. It preserved Spanish and Mexican mining law, but notably did not preserve the water law of New Spain. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., §§ 1, 2, 1840 Repub. Tex. Laws 3, 4, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 177, 178 (Austin, Gammel Book Co. 1898). When it became a state in 1845, Texas reserved the ownership of its public land, water, and other natural resources. *See* Ordinance adopted July 4, 1845, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1228. Each of these political, legal, and historical events shaped Texas water law.

This evolution continued through the Republic period and as the new state took form. Sixteen years after the adoption of the common law in 1840, the courts adopted a version of the common-law riparian rights system. *Haas v. Choussard*, 17 Tex. 588, 589 (1856); *see also* A. Dan Tarlock, *Law of Water Rights and Resources* ch. 3 (Clark Boardman Callaghan & Co. 1988) [hereinafter Tarlock]. The period from 1845 through the 1870s was politically uncertain. Texas seceded from the Union in 1861 and returned to statehood in 1870. Wells H. Hutchins, *Texas Law of Water Rights* 1–3 (1961) [hereinafter Hutchins]. During these unstable times, the Legislature faced with public pressure to

develop the state's water resources, passed the Irrigation Act of 1852 to encourage local private irrigation projects. *See* Act approved Feb. 10, 1852, 4th Leg., R.S., ch. 74, 1852 Tex. Gen. Laws 80, *reprinted in* 3 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 598. This began a divergence of water law principles: The courts followed the common-law water rights riparian system, while the legislature passed statutes regulating the use of water. This created a disconnected and confused legal water rights system. Because this period was marked by political discontent, public focus was on ensuring the stability of government, rather than on regulating the state's water resources. Later, when people were free to pursue a better life and economic stability, the need for developing the state's resources gained attention, and the legislature, recognizing these needs, adopted the law of prior appropriation in the Irrigation Act of 1889. *See* Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 88, 1889 Tex. Gen. Laws 100, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1128.

In an effort to improve the 1889 Act, the legislature passed the 1893 Act and then the Irrigation Act of 1895, which extended the scope of the 1889 Act and confirmed the dual system of water rights: common-law riparian rights, as previously recognized by the courts, and statutory prior appropriation rights established by the legislature. *See* Act of Mar. 29, 1895, 23d Leg., R.S., ch. 44, 1893 Tex. Gen. Laws 47; Act of Mar. 9, 1895, 24th Leg., R.S., ch. 21, 1895 Tex. Gen. Laws 21, *reprinted in* 10 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 751. This legislative policy of state control of water resources, while recognizing private property rights, was reinforced by legislation passed in 1913 and 1917–18. The dual system of surface water rights and the dichotomy of the state ownership of surface water and protection of private property rights led to confusion, which was not resolved until the en-

actment of the Water Rights Adjudication Act in 1967. *See In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 439 (Tex. 1982) (noting that water law in Texas "was in a chaotic state prior to the enactment of the Water Rights Adjudication Act in 1967").

Thus, it took almost 125 years after statehood for Texas to address all water resource rights and provide a means of adjudicating the nature and extent of all surface water claims. Surface water rights were defined and quantified by the 1967 Act, with those rights claimed both under common law and the prior appropriation statutes.

As a result of the adjudication proceedings undertaken under the 1967 Act, the common-law riparian right was converted into an appropriative right. The Act set the stage for better water management and refinement of Texas law on how surface water rights are exercised and managed. This refinement is continuing today as water managers, courts, and state water agencies in an effort to meet the changing and increasing needs for water in a state that has a growing population and is changing from a predominantly agrarian society to a commercial and industrial society struggle with issues such as reuse, environmental flows, interbasin transfers, the hydrologic connection between surface and groundwater, and conjunctive use of surface and groundwater.

II. The History of Surface Water Rights

A. Spanish and Mexican Law and Its Influence

Before 1836, settlers from Spain and Mexico developed irrigation and municipal water systems in several areas of what is now Texas, particularly in the El Paso, San Antonio, and Laredo areas. The irrigation system in San Antonio is the best Texas example of the practical application of Spanish and Mexican water law.

The San Antonio irrigation system contained several ditches or "acequias." Each acequia served a community of irrigators who operated their ditches within an administrative framework provided by the local government. The settlements were governed by the *alcalde* and *regimentos,* or in modern terms the community authority and the mayor, under authority granted by the king. *See San Juan Ditch Co. v. Cassin*, 141 S.W. 815 (Tex. Civ. App.—San Antonio 1911, writ ref'd). A similar system was created and maintained on the Rio Grande in the El Paso Valley on both sides of the river. These acequias also provided the Catholic missions and civil settlements with water for domestic use. *See* Betty Eakle Dobkins, *The Spanish Element in Texas Water Law* 103–13 (University of Texas Press 1959).

These water supply projects were politically, socially, and economically necessary during the Spanish colonization period, and helped to prevent the westward expansion of the French. In these early settlements, acequias were established to serve the missions, the presidio, domestic needs, and the limited irrigation needs of settlers' lands. *See* Hutchins, at 102–03.

Under Spanish and Mexican law, surface water was reserved to the king or the government who governed its use, with the exception that people abutting a stream had the right to

use water for basic domestic and livestock needs as a common-to-all use of water in the stream. A surface water right was gained for generally larger uses not abutting a stream—that is, not riparian to a stream—for irrigation, commercial, *and* industrial purposes only by a grant from the sovereign or by legal processes provided by the government. *See* Hans W. Baade, *The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 St. Mary's L.J. 1 (1986).

As discussed below, early water law court decisions, such as *Haas v. Choussard*, 17 Tex. 588 (1856), and later *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926), misunderstood these legal concepts and were later reconsidered and overturned. Later courts clarified this historical influence and relied on it to support their decisions. *See, e.g., State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *op. adopted*, 355 S.W.2d 502 (Tex. 1962), discussed below.

B. Republic of Texas Period

When the Republic of Texas was established, it continued to be governed by Spanish and Mexican civil law during the period 1836-40. The validity and legal effect of contracts and grants of land were determined according to the civil law in effect at the time of the contract or grant. *Miller v. Letzerich*, 49 S.W.2d 404, 407–08 (Tex. 1932). Therefore, statutes in force during this period were construed in light of Mexican civil law. As noted above, the Republic adopted the English common law in 1840. At that time, embedded in English common law was a riparian right to use surface water. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., §§ 1, 2, 1841 Repub. Tex. Laws 3, 4, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 177, 178. From 1836 through 1845, except for adoption of the Eng-

lish common law, there is little or no record of attention to water law. This obviously was because of other more pressing matters of the Republic. No water laws of significance were enacted until some years after Texas became a state.

C. Early Statehood Period

The Republic of Texas became a state of the United States in 1845, and unlike other states it retained its public debt and obligations. Because of political pressures of the time and possibly because of the unknown nature of the debt, the state retained its public land and resources and debt. *See* Joint Resolution for Annexing Texas to the United States, 5 Stat. 787, 28th Cong., 2d Sess. (approved Mar. 1, 1845); Ordinance adopted July 4, 1845, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1228. The result was that the United States did not initially have federal public lands in Texas as it had in other states. This fact significantly influenced the development of water law and water management in Texas in ways unique from other states. Also, the needs of the time dictated the development of a strong agricultural economy to encourage migration and produce food for the State's population growth.

1. Irrigation Act of 1852

The first general law on the subject of water was the Irrigation Act of 1852, which was significant because irrigation enhanced agricultural production vital to the state's economy and growth. The 1852 Act authorized counties to regulate dams and distribute shares of the water. *See* Act approved Feb. 10, 1852, 4th Leg., R.S., ch. 74, 1852 Tex. Gen. Laws 80, *reprinted in* 3 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 598. Consistent with the "the

principles of the Mexican laws", Counties were given authority to regulate the construction, operation, and maintenance of irrigation works, similar to the former regulatory power of the community *alcalde* system of Spanish and Mexican law. *Tolle v. Correth*, 31 Tex. 362, 364–65 (1868). It was observed that the 1852 Act was consistent with "ancient law" that regulated community irrigation. Harbert Davenport, *Development of the Texas Laws of Waters*, 21 Tex. Rev. Civ. Stat. Ann. XIII, XIX (Vernon 1954) [hereinafter Davenport]. The 1852 Act remained the law in Texas until its repeal by the so-called "Water Appropriation Statute of 1913." Hutchins, at 104–05. See discussion below.

2. Riparian Rights

After the adoption of the common law of England in 1840, there was embedded in Texas law an aspect of the English common law that ownership of land riparian to a stream or natural lake includes, by implication, a right to use water from the stream or lake. *See* Tarlock, ch. 3. However, it was not until sixteen years later, after the legislature's first attempt to manage the use of surface water by the Irrigation Act of 1852 discussed above, that the courts applied English common law to Texas water law. In 1856, the Texas Supreme Court held in *Haas v. Choussard* that the "right to the use of water adjacent to one's lots, as it flowed in its natural channel was a right inherent and inseparably connected with the land itself." *Haas*, 17 Tex. at 589; *see generally* Ira P. Hilderbrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 Texas L. Rev. 19 (1927). The recognition of this right was significant, especially for irrigation in the semiarid regions of Texas. *Tolle v. Correth*, 31 Tex. 362, 364–65 (1868); *Rhodes v. Whitehead*, 27 Tex. 304, 310–11, 315–16 (1863).

In *Fleming v. Davis*, 37 Tex. 173, 201–02 (1872), for example, the applicability of riparian water rights to semiarid areas was contested. The court was urged to judicially adopt the California prior appropriation system. In this case, a downstream riparian user on a stream sued an upstream user for unreasonably using water from springs, which were the headwaters of the stream. The upstream user was using the entire flow for his domestic and irrigation purposes. The court concluded, applying common-law riparian rules, that the upstream user could be enjoined from *unreasonable* detention and use of all the water while it was on his property; that without a contract or an express grant of water, the upstream user had only the right to use water co-equally with the rights of all other riparians to have the benefits of the water. Thus, the reasonable use and correlative rights concept was applied to the common-law riparian right. The court, however, advised the legislature that "the wealth and comfort of our people throughout a large portion of the State might be greatly augmented by wise legislation on this subject."

3. Special Laws Creating Private Irrigation Companies

While the courts in the cases discussed above recognized a Texas version of common-law riparian rights, between 1854 and 1879 multiple special laws were passed granting individuals, cities, and corporations authority to construct dams and other works for the purpose of water development through irrigation enterprises. *See* 4 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 151, 400, 580, 823, 1202, 1294; 5 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 536, 789, 793–94, 1318, 1431, 1572, 1584, 1605, 1607; 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 712; 7 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 191. During this same period, at least fourteen of these laws granted the right to divert water

from various streams for irrigation and other purposes. *See, e.g.*, 4 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1314; 5 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 231, 302, 570, 1284, 1360, 1491, 1627; 6 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 683, 1470, 1621; 7 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 316, 1310; 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 14. In these special acts, the Texas legislature granted private companies the power to construct dams and divert water from a river. The grants made by these legislative acts did not take into account whether the owners owned any riparian land and contemplated use by the owner of water for irrigation purposes without restriction as to the riparian users of the water. A.W. Walker, Jr., *Legal History of the Riparian Right of Irrigation in Texas Since 1836*, 41, 47, Proceedings, Water Law Conference, Univ. of Texas (1959). These special acts illustrate the legislature's reliance on the legal concept that the state's land and surface waters were public waters of Texas, subject to state control within basic constitutional restraints.

For example, the Texas legislature authorized the formation of the El Paso Irrigation and Manufacturing Company for the purpose of providing irrigation to the El Paso Valley and granted to the private company the power "to divert from the channel or bed of the Rio Grande one-fourth of all the water forming said river, and apply the same to the purposes or [sic] irrigation." *See* Act approved Nov. 6, 1866, 11th Leg., R.S., ch. 157, § 10, 1866 Tex. Spec. Laws 271, 273, *reprinted in* 5 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1491, 1493.

Water policy at that time recognized that encouraging irrigation development was important and that the state had to play a role in the development of its natural water resources.

For example, a law enacted on December 20, 1861, authorized the imposition of a fine on any person who refused to work on a ditch when summoned to do so by proper authority and apparently was intended to supplement the 1852 Act. Act approved Dec. 20, 1861, 9th Leg., R.S., ch. 15, 1861 Tex. Gen. Laws 8, *reprinted in* 5 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 452.

Texas statutes relating to private corporations, however, developed more rapidly than the statutes defining the right to the water itself. This legal development added a layer of complexity to the evolving water law. For example, the Private Corporation Act was passed in 1871, which provided for the organization of canal companies for the purpose of irrigation. Act approved Dec. 2, 1871, 12th Leg., 2d C.S., ch. 74, § 2, 1871 Tex. Gen. Laws 66, 67, *reprinted in* 7 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 68, 69. Section 58 of the Private Corporation Act of April 23, 1874, made ample provision for the organization of "canal companies for the purpose of irrigation" and authorized each such corporation "to construct its canals across, along, or upon any stream of water." Act approved Apr. 23, 1874, 14th Leg., R.S., ch. 97, § 58, 1874 Tex. Gen. Laws 120, 134, *reprinted in* 8 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 122, 136. The following year, the legislature enacted a comprehensive statute to encourage the construction of canals and ditches for navigation and irrigation. It also authorized the granting of public land for each mile of canal constructed, when approved and accepted by the governor, and stated "that any such canal company *shall have the free use of the water* of the rivers and streams of this State; but in no case shall any company flow lands to the detriment of the owners without their consent, or due payment to the parties aggrieved." Act approved Mar. 10, 1875, 14th Leg., 2d C.S., ch. 62, § 7, 1875 Tex. Gen. Laws 77, 79, *reprinted in* 8 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at

449, 451 (emphasis added). As discussed below, this language later proved to be insufficient to grant a private property right to actually take water from a stream where there were existing riparian claimants.

These early irrigation laws were not water rights statutes as such but were related to public regulation of commonly owned private irrigation enterprises. These statutes do, however, indicate that the legislature believed that, based on the reservation of ownership of public land and waters by the state, it was authorized to grant rights to surface waters in Texas streams. At the same time, without further constitutional authority, the courts continued to recognize a form of common-law riparian rights.

The competing interest created by this dual system was highlighted in *Mud Creek Irrigation, Agricultural and Manufacturing Co. v. Vivian*, 11 S.W. 1078 (Tex. 1889), in which a private irrigation company attempted to enforce its charter and its statutory rights. The company sought to enjoin Vivian and others from maintaining a dam on Mud Creek in Kinney County above the point where the waters of the creek entered the company's canal. The company alleged that under applicable law and its charter it had exclusive use of the waters of the stream. The court disposed of this contention by holding that "the charter *conferred the right to acquire* water privileges, but it did not confer the privileges themselves." *Mud Creek Irrigation*, 11 S.W. at 1078–79 (emphasis added). The court was logical and resourceful in holding that while the company was vested with the power to *acquire*, as a private corporation, a privilege to take the waters of the creek for the purpose of irrigation, the statute did not expressly grant the right to take and use the waters. The company had to obtain this right to take water from the stream. The case left open the question of how such a company was to obtain this water right.

The court noted that canal company statutes discussed above applied only to streams on public lands because the legislature had no power to take away or impair the *vested rights of riparian owners* without providing for the constitutional right to just compensation. This case illustrates the dilemma that existed for individuals desiring to develop their water rights. Companies, such as the plaintiff in *Mud Creek Irrigation*, had to invest relatively large amounts of capital to start and operate such enterprises, which the state encouraged by enacting statutes establishing entities to develop water resources. The legislature, however, ignored the need for laws regarding the actual right to take and use water from the state's streams. At the same time, the courts were protecting their version of common-law riparian claims as a private property right. Making the situation even more difficult was the fact that the period from 1855 to 1864 was one of the most sustained droughts ever experienced in the state, causing water shortages lasting until 1888. *See* David W. Stahle & Malcolm K. Cleaveland, *Texas Drought History Reconstructed and Analyzed from 1698 to 1980*, 1 J. Climate 59, 66, 72 (1988) [hereinafter Stahle & Cleaveland]; Douglas Helms, *Great Plains Conservation Program, 1956–1981: A Short Administrative and Legislative History, reprinted from Great Plains Conservation Program: 25 Years of Accomplishment*, U.S. Department of Agriculture, SCS National Bulletin No. 300-2-7 (1981), *available at* **www.nrcs.usda.gov/about/history/articles/GreatPlainsConservPrgm.html.**

Responding to political and economic pressures, the legislature addressed these problems in the Irrigation Act of 1889.

4. Texas Legislative Acts Adopting the Prior Appropriation Doctrine

a. The Irrigation Act of 1889

The purpose of the Irrigation Act of 1889 was "to encourage irrigation, and to provide for the acquisition of the right to the use of water, and for the construction and maintenance of canals, ditches, flumes, reservoirs, and wells for irrigation, and for mining, milling, and stockraising in the arid districts of Texas." Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 88, 1889 Tex. Gen. Laws 100, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1128.

The first four sections of the Act provided:

> Section 1. Be it enacted by the Legislature of the State of Texas: That the unappropriated waters of *every river or natural stream* within *the arid portions of the state of Texas*, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation, domestic, and other beneficial uses: Provided, that said water shall not be diverted so as to deprive any person who claims, owns, or holds a possessory right or title to any land lying along the bank or margin of any river or natural stream of the use of the water thereof for *his own domestic use*.
>
> Section 2. That *the unappropriated waters* of every river or natural stream within the arid portions of the state, as described in the preceding section of this act, are hereby declared to be the property of the public,

> and may be acquired by appropriation for the uses and purposes as hereinafter provided.
>
> Section 3. The appropriation must be for the purposes named in this act, and when the appropriator, or his successor in interest, ceases to use it for such purpose the right ceases.
>
> Section 4. As between appropriators, the one first in time is the one first in right to such quantity of the water only as is reasonably sufficient and necessary to irrigate the land susceptible of irrigation on either side of ditch or canal.

Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 88, §§ 1–4, 1889 Tex. Gen. Laws 100–01, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1128–29 (emphasis added).

The Act made clear that the unappropriated waters within the *arid portions* of the state were the property of the state and adopted the prior appropriation doctrine of first in time, first in right. The Act clarified the method by which irrigation ditch companies could acquire a right to take water from a stream by filing a declaration of appropriation in the office of the county clerk of the county where the headgate of the proposed canal or ditch was to be located.

The primary goal of this statute was to protect irrigation ditch companies, and its key purpose was to authorize these companies to appropriate water, urging that irrigation canals should be built "at once." Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 88, §§ 1, 2, 5, 17, 1889 Tex. Gen. Laws 100–03, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1128–31. The Act also protected the right of a landowner who owned property adjacent to the stream to use water of the stream "for his own domestic use," thereby statutorily

confirming the state's dual system of water rights, to this extent, in the arid portions of the state.

The caption of the legislation included a reference to "wells for irrigation," which expressed an intent to include water wells and groundwater within its scope in the arid portions of the state. However, the statute itself did not address wells. From a historical perspective, it is interesting to note what would have occurred in later years with respect to groundwater law if the legislature and courts had expanded on this intent to include groundwater within the appropriation doctrine. See discussion below under *The Conservation Amendment: 1917* (4f.) and Chapter 4 of this book for a discussion of the development of groundwater laws in Texas.

Only the riparian right aspects of the Act were interpreted by the courts. The Supreme Court of Texas, in *McGhee Irrigating Ditch Co. v. Hudson*, 22 S.W. 967 (Tex. 1893), without referring to section 1 of the Act, which protected only riparian domestic use, held:

> Section 2 of the act cannot operate, and probably was not intended to operate, on the rights of riparian owners existing when the law was passed, but was intended to operate only on such interests as were in the State by reason of its ownership of land bordering on rivers or natural streams; and it may be that there are some other parts of the act that would have to be so limited. . . . The word "land" includes not only soil, but everything attached to it, whether attached by course of nature, as trees, herbage, *and water*, or by the hand of man, as buildings and fences.

McGhee Irrigating Ditch Co., 22 S.W. at 968 (emphasis added).

The court narrowly construed section 2 of the Act, with reference to the protection of riparian rights, but did not consider section 1, which protected only domestic riparian use.

The Act was later amended in 1893, addressing the manner of evidencing claims by filing declarations of appropriation in the county records, but made no other significant change and did not refer to riparian water rights claims. Act approved Mar. 29, 1893, 23d Leg., R.S., ch. 44, 1893 Tex. Gen. Laws 47, *reprinted in* 10 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 447. The 1889 and 1893 Acts were replaced by a much broader and comprehensive statute in 1895, which gave some deference to the *McGhee* court's protection of riparian claims.

b. The Irrigation Act of 1895

The legislature extended, and clarified to an extent, the prior appropriation doctrine in the Irrigation Act of 1895. Act of March 9, 1895, 24th Leg., R.S., ch. 21, 1893 Tex. Gen. Laws 21, *reprinted in* 10 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 751. This law sought to reserve to the state stormwaters or rainwaters and, in deference to court holdings, protected the rights of riparian owners to the ordinary flow and underflow of a stream. It declared in the first five sections of the Act:

> Section 1. Be it enacted by the Legislature of the State of Texas: That the un-appropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain waters of every river or natural stream, canyon, ravine, depression or water-shed within those portions of the State of Texas *in which by reason of the insufficient rainfall or by reason of the irregularity of the rainfall*, irrigation is beneficial for agricultural purposes, are hereby declared to

be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided.

Section 2. The storm or rain waters, as described in the preceding section, may be held or stored in dams, lakes or reservoirs built and constructed by a person, corporation or association or persons for irrigation, mining, milling, the construction of waterworks for cities and towns, or stockraising, within those portions of Texas described in the foregoing section; and all such waters may be diverted by the person, corporation or association of persons owning or controlling such dam, reservoir or lake for irrigation, mining, milling, the construction of waterworks for cities and towns, and stockraising.

Section 3. The ordinary flow or underflow of the running water of every natural river or stream within those portions of Texas described in section 1 of this act may be diverted from its natural channel for irrigation, mining, milling, the construction of waterworks for cities and towns, or stockraising: *Provided, that such flow or underflow of water shall not be diverted to the prejudice of the rights of the riparian owner without his consent, except after condemnation thereof in the manner as hereinafter provided*.

Section 4. The appropriation of water must be either for irrigation, mining, milling, the construction of waterworks for cities and towns, or stockraising.

Section 5. As between appropriators the first in time is the first in right.

Act of March 9, 1895, 24th Leg., R.S., ch. 21, §§ 1–5, 1893 Tex. Gen. Laws 21–22, *reprinted in* 10 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 751–52 (emphasis added).

The 1895 Act not only encouraged irrigation but also addressed water for mining, milling, and stock-raising uses and waterworks for cities and towns. It established the method by which irrigators and others could develop dams and take water.

By special proviso, the Act protected a riparian owner's right to the ordinary flow or underflow of water in a stream, but it failed to define "ordinary flow" or what rights a riparian owner had with respect to the remaining "unappropriated ordinary flow" in a stream. As later judicially and legislatively confirmed, the Act reserved to the state all of the unappropriated running waters, including ordinary flows, stormwater, and flood water on a statewide basis. This means that public lands granted after July 29, 1895, the Act's effective date, do not carry with them a riparian water right claim unless expressly provided in the grant. Common-law riparian rights were limited to "ordinary flows or underflow" and to land granted or patented before July 29, 1895. These defining dates became even more significant during the statewide adjudication of water rights undertaken under the Water Rights Adjudication Act of 1967. See discussion below.

The 1895 Act also limited the ratemaking power of irrigation companies, previewing existing law with respect to regulation of rates charged by some entities for the supply or delivery of potable or nonpotable water. See Chapters 35 and 37 of this book.

In summary, the 1895 Act was primarily directed at irrigation use of water; it required irrigation ditch companies and developers of irrigation to obtain recognition for their projects

by a local filing process in local county records, reminiscent of the Spanish and Mexican system of local control subject to the sovereign's control. Similar to the prior appropriation doctrine adopted in the western United States, it provided a process to obtain a legally recognized right to use water. This provided an incentive which encouraged investment in agricultural water projects by providing a process to acquire a recognized legal right to use water from a stream. It also provided the security of recognition of a water rights since the essential element of the appropriation doctrine system, "first in time is the first in right"—that is, the priority system—was made clear, and provided a means of enforcement of water rights. Nonetheless, it left much uncertainty about the nature of the riparian right and how it was to be reconciled with the appropriation doctrine of water rights.

During the period 1895–1913, knowledge of practical irrigation improved steadily, and the development of irrigation pumping converted small gravity flow irrigation systems to much larger pumping and gravity flow irrigation operations. More land was developed into large irrigated areas. *See* Davenport, XXIII. However, water rights claimants still had an incomplete system of water laws to ensure that their claims were honored.

c. The Dual System and Conflicts in the Courts

During this period water rights holders had to rely on the courts to resolve their disputes. This was an awkward process. It required injunction lawsuits, so that a court could exercise its equitable powers in attempting to resolve conflicts. A court could resolve only disputes between individual parties in the litigation; courts could not take into account the impact of such litigation on other water rights holders on a stream or a segment of a stream. The pro-

cess also placed the courts in the difficult position of dealing with technical hydrologic and water management questions without the aid of relevant hydrologic evidence.

An example of these difficulties is an early water dispute after the 1889 and 1895 Acts but before the 1913 Act. In *Biggs v. Miller*, 147 S.W. 632 (Tex. Civ. App.—El Paso 1912, no writ), users of water from the Pecos River through one irrigation system called the "Barstow System" sought to enjoin other users through an 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.

Evidence showed that a prior federal court judgment had adjudicated to the Barstow System, whose diversion point was below the Biggs System, the prior and more senior right to use water for irrigation purposes on both its riparian and non-riparian lands. That judgment ruled that the more junior upstream Biggs System was subject to such rights as to irrigating its non-riparian lands but not its riparian lands even though the Biggs System was more senior. In other words, the first in time principal did not apply to the riparian lands.

The Miller 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 issues about 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 the 1895 Act and riparian rights as to riparian lands by declaring: "By our statutes, the waters of such rivers as the Pecos are property of the public. Riparian owners have easements therein, which cannot be divested, save, 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." *Miller*, 147 S.W. at 637. The court disagreed with some of the equitable findings of the trial court, 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, writ dism'd), which involved a downstream 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 as 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 to have all the water flow past his land, there could never be an effective appropriation 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 has 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 show 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.

Lee, 147 S.W. at 710–11.

These cases illustrate the many complex issues arising (1) in interpreting and enforcing individual water rights claimants claiming both appropriative and riparian rights; (2) 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 (3) without the benefit of technical definition of rates of flow, system capacities, and other relevant hydrologic evidence. They also illustrate the frustration exhibited by the courts in reconciling the dual system of law. For later litigation on the Pecos River, see the following cases: *Ward County Water Improvement District No. 2 v. Ward County Irrigation District No. 1*, 214 S.W. 490 (Tex. Civ. App.—El Paso 1919, no writ); *Hoefs*

v. Short, 273 S.W. 785 (Tex. 1925); *Ward County Water Improvement District No. 3 v. Ward County Irrigation District No. 1*, 237 S.W. 584 (Tex. Civ. App.—El Paso 1922), *modified*, 295 S.W. 917 (Tex. 1927); *Wilson v. Reeves County Water Improvement District No. 1*, 256 S.W. 346 (Tex. Civ. App.—El Paso 1923, no writ). The relative rights on the Pecos River were never fully resolved until adjudication under the Water Rights Adjudication Act of 1967. (See section II.E.1 below.) *See Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex. 1905); *City of Wichita Falls v. Bruner*, 191 S.W.2d 912 (Tex. Civ. App.—Fort Worth 1945, writ ref'd w.o.m.); Neal King, *Inadequacies of Existing Texas Procedure for Determination of Water Rights on Major Stream Segments* 66–73, Proceedings, Water Law Conference, University of Texas (1956).

Historically, the privately operated and financed irrigation companies that were expected to build irrigation diversion and delivery (canal) systems did not work well. Money was difficult to raise. In many instances, without further incentives other than land grants from the state, irrigation did not develop as expected after the 1895 Act. At the same time, the "filing" system provided in the 1895 Act left much to be desired. As the state grew, increased irrigation needs and population growth, and the resulting need for municipal and industrial use of water, highlighted problems with the early acts. Droughts, floods, and the need to develop agriculture and other uses constituted conditions for change.

The common-law riparian rights were yet to be defined, and the appropriation declarations filed with the county clerks required only that the amount of water to be appropriated and the area to be irrigated be stated generally as to appropriation statutory rights. This left open to conjecture many details of an appropriative statutory water right such as the specific location of use, purpose, rates, and location of diversion points. The system's lack of a manageable defini-

tion of riparian rights added to the uncertainty. This process did not create a system by which all water rights could be inventoried and managed. *See* A.P. Rollins, *The Need for a Water Inventory in Texas* 67–68, Proceedings, Water Law Conference, University of Texas 67, 68 (1952).

These circumstances first led to a constitutional amendment in 1904 providing for the establishment of water districts. These political subdivisions would have the means to provide money necessary for the development of operations and facilities through assessments paid by water users and through taxation of the benefited land. The 1904 amendment did not, however, address the means of acquiring the right to take (divert) water from the state's rivers. Following another drought in 1910 and intermittent floods in the 1910–13 period, the legislature made basic changes to surface water law in 1913.

d. The Irrigation Act of 1913

The Irrigation Act of 1913, also known as the Burges-Glasscock Act,. created the Board of Water Engineers and centralized the statutory water rights inventory process by providing that waters belonging to the state could be appropriated only pursuant to permits issued by that board through procedures provided in the Act. See Act of April 9, 1913, 33d Leg. R.S., ch. 171. While acknowledging commonlaw riparian rights, it did not address their nature and extent.

The 1913 Act repealed earlier water laws, primarily those applicable to the arid regions of Texas, and adopted a uniform system of statutory water laws. "In essence, the [1913 Act] declared all waters within Texas to be the property of the State, and provided means [and process] by which . . . water could be appropriated for designated purposes, including 'wa-

terworks for cities and towns.' (Secs. 2 and 4)." *Texas Water Rights Commission v. City of Dallas*, 591 S.W.2d 609, 613 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

The Board of Water Engineers was given authority to grant permits for the statutory appropriation of the state's waters. The Act required that certified copies of all records of previous declarations of prior appropriation of water filed locally under the 1889 and 1895 Acts be filed with the board. The filings included sworn statements as to the extent of work done and the amount of water that had been taken or appropriated from a stream. Some forty years later, these rights were defined as certified filings. *See* Act approved June 8, 1953, 53d Leg., R.S., ch. 352, § 2.

The 1913 Act provided that the "ordinary flow and underflow" of watercourses could not be diverted to the prejudice of the "rights of any riparian owner" without consent, but it did not define the measure or extent of a riparian right. The Act confirmed the intent of the 1895 Act's reservation of "storm waters" for later appropriation. It further cemented the dual system of water law, but in doing so clarified that nothing in the Act was to be "construed as a recognition of any riparian right in the owner of any lands the title to which . . . passed out of the state" after 1895. To this extent, the Act limited a riparian right to grants and patents issued before 1895.

The Act clarified the legislative intent in the 1895 Act with respect to the period by which the undefined riparian right could be claimed, but the extent or measure of the right was yet to be determined. The Act also made clear that the appropriation doctrine applied to the entire state, which allowed a more manageable statewide permitting system compared to the previous filing system with local county clerks. Nevertheless, the Act failed to provide a mechanism for the comprehensive inventory and adjudication of "vested" riparian rights,

which would be necessary for rational allocation of the water that remained to be appropriated.

The Act did seek to clarify water rights laws with respect to irrigation use and development as well as municipal and industrial water needs. In this regard, one of the active sponsors of the Act, Rep. D. W. Glasscock, in addressing the house on behalf of the 1913 Act, stated:

> While known as the "Irrigation Bill," it is in fact much more extensive in scope than this term would indicate, and is an effort to form a comprehensive system of statutory "Water Law" for this State. It deals, not only with the important question of irrigation, in which millions of capital is now invested in this State and upon which many thousands of people are dependent; but also with every right to the use of water; from the primary use for drinking and domestic purposes, the supply of cities and towns, the natural use for stock raising, the uses for mining, the development power, and other purposes; up to the problem of conservation of this great natural resource, and its control, application and use, to the benefit of all people of this State.

H.J. of Tex., 33d Leg., R.S. 949–50 (1913). *See Texas Water Rights Commission*, 591 S.W.2d at 613.

At the time, 90 percent or more of water was used for irrigation. Rep. Glasscock's words, when considered in light of the alternating droughts and floods and the words of the Act, show a recognition of population growth. They also show an intent to define the riparian right in terms of a natural right for domestic and livestock use, but many believed it gave

protection to a riparian right to irrigation. *See* Davenport, at 1. It was not long before these issues were addressed by more legislation and another important constitutional amendment.

e. The Irrigation Act of 1917

A drought in 1917 increased water needs and public pressure to develop the state's water resources, culminating in the repeal of the Irrigation Act of 1913 by the 1917 Irrigation Act. *See* Act of Mar. 19, 1917, 35th Leg., R.S., ch. 88. The 1917 Act included most of the substance of the 1913 Act while clarifying the permitting process. More significantly, the Act added provisions for adjudication of water rights. Some contemporaries of the 1917 Act believed it destroyed the intent of the 1913 Act, which protected riparian rights claimants. *See* Davenport, at 1. The public's mood and the legislature's intent, however, were to give the state more control over the development of water resources. To evidence this, in the same session, a constitutional amendment was proposed to assure legislative authority in this respect. S.J. of Tex., 35th Leg., R.S. 500 (1917).

f. The Conservation Amendment: 1917

On August 21, 1917, the citizens of Texas approved a constitutional amendment, Tex. Const. art. XVI, § 59, referred to as the "Conservation Amendment." The amendment enabled the legislature to create governmental entities whose purpose was to conserve water by developing the water resources. The term "conservation" meant the development of water resources through local and regional water districts, using dams, reservoir projects, and delivery systems. Water was "conserved" through use or storage for later use before it was lost to the Gulf of Mexico. The amendment provided in part:

> Sec. 59(a). The conservation and development of *all* of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood *waters*, the *water* 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 overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, 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.

Tex. Const. art. XVI, § 59(a) (emphasis added). The Conservation Amendment covers all natural resources, including both groundwater and surface water. The Texas Supreme Court in *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (Tex. 1999), stated that the Conservation Amendment passed after *Houston & Texas Central Railroad Co., v. East*, 98 Tex. 146, 81 S.W. 279 (1904), the seminal groundwater law case in Texas. "…made clear that in Texas, responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature…" and are "public rights and duties" 1 S.W.3d at page 77. As discussed in Chapter 4 of this book, the Legislature has thus far chosen regulation through local groundwater conservation district with respect to groundwater. With respect to surface water the governmental entities to be created were conservation and reclamation

districts with such powers concerning the subject matter of the amendment as conferred by law. *See* Tex. Const. art. XVI, § 59(b).

The Conservation Amendment is important in many respects. First, it declared that all water resources were public rights and duties. Second, it empowered the legislature to pass such laws "as may be appropriate" in the conservation, development, distribution, and control of its water resources. Third, it vested lawful rights acquired prior to its enactment while granting authority to the legislature to pass laws appropriate to protect the public's rights. This became the legal dividing line in the development of water laws: the legislature was empowered to pass laws subject only to the test of "appropriateness" in the context of the intent expressed in the Conservation Amendment.

This constitutional authority was not self-enacting, requiring action by the legislature. By its very terms, the duty is placed on the legislature to execute the public policy expressed in these provisions. *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (1955). The legislature promptly acted to legally confirm the 1917 Act and its provisions.

g. The 1918 Act

In 1918, after passage of the Conservation Amendment, the legislature amended the 1917 Act to confirm and clarify, among other things, the extent of the power of the Board of Water Engineers to issue permits and to adjudicate existing water rights and its authority pertaining to water rates charged by suppliers for the use of water. *See* Act approved Mar. 21, 1918, 35th Leg., 4th C.S., ch. 88. This Act is sometimes called the Canales Act, after its main legislative sponsor.

In 1921, however, the Supreme Court of Texas held that the adjudication provisions in the 1917 Act were unconstitutional because they delegated judicial powers to an administrative agency. *See Board of Water Engineers v. McKnight*, 229 S.W. 301 (Tex. 1921). This was a significant decision for two reasons. On the positive side, it recognized that a vested water right is a property right. On the negative side, it delayed the proper management of surface water for many decades by dismantling the effort to adjudicate and quantify existing water rights. In the words of Chief Justice Pope, that decision "ushered in a half century interregnum during which there was no inventory of available water, and no record of the extent of claims upon the dwindling supply." *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 441 (Tex. 1982). *See* discussion of the *McKnight case* at Section II.E.1, below.

h. The 1925 Act

In 1925, because of the *McKnight* decision, water legislation was passed that omitted the adjudication provisions of the 1917 and 1918 Acts and thereby repealed those provisions. Act approved Mar. 28, 1925, 39th Leg., R.S., ch. 136 (art. 7500a of the Texas Civil Statues). This legislation also changed the domestic and livestock reservoir exemption and the provisions regarding water districts, which are discussed more fully below.

i. The Dual System and Conflicts in the Courts Continue

In 1926, the Texas Supreme Court, in *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926), analyzed in depth the development of water law in Texas. 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 claim-

ant'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 evolution of Texas water laws as construed by a court in 1926.

In this case, the appropriator contended that the riparian right on a natural or statutory navigable stream extended only to domestic stock and household uses, and rights for other uses, including irrigation, 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 continuation of the dual system of water rights under existing statutes was squarely before the court. 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." *Motl*, 286 S.W. at 467 (citing *Watkins Land Co. v. Clements*, 86 S.W. 733 (Tex. 1905); *Board of Water Engineers v. McKnight*, 229 S.W. 301 (Tex. 1921); *Martin v. Burr*, 228 S.W. 543 (Tex. 1921)).

Having held that a riparian right to irrigation existed, the court recognized that a riparian right attached only 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 noted:

> [T]hat 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 ripari-

> an 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.

Motl, 286 S.W. at 468–69. In applying this legal definition of flows, the court affirmed the judgment enjoining the riparian from pumping from a reservoir, *except when water was running over the appropriator's dam*. This ruling had practical results: (1) it allowed the appropriator to take as much water as desired, whether the water was ordinary or flood flow; (2) it allowed the riparian to pump water only 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. Needless to say, confusion was created as courts attempted to apply the holding in other cases.

The court's decision that a riparian right to irrigation exists and the court's perpetuation of the dual system of water rights were the significant aspects of the holding. The court's definition of "ordinary flow and underflow" and "storm flow and flood flow," normally a matter of hydrology and science rather than law, caused much uncertainty. Though considered to be *dicta*, the court's definition was problematic in determining water rights claims and in planning reservoir projects, which were designed to capture stormwaters and flood waters for later use, but as a practical matter also captured ordinary flows and "conserve water."

The *Motl* court made another significant though often overlooked holding. In spite of the earlier similar attack on the adjudication provisions in the 1917 and 1918 Acts in *Board*

of Water Engineers v. McKnight involving the separation of powers doctrine, the *Motl* court concluded that the provisions providing for the issuance of permits to appropriate waters (granting a water right) were valid and constitutional even though it was done by an administrative agency (the Executive Branch) instead of directly by the Legislature. *Motl*, 286 S.W. at 474–75.

Another illustrative case is *Humphreys-Mexia Co. v. Arseneaux*, 297 S.W. 225 (Tex. 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 a dam across the Navasota River constructed by the plaintiff. The defendants owned land riparian to the reservoir and claimed riparian rights to water impounded by the plaintiff's dam. The defendants installed a pump on the river to divert water from impounded water constructed by the plaintiff, and sold it to 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 natural stream. On the other hand, the plaintiff had obtained a permit to impound waters from the river on the dam involved. 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 nonriparian land.

The court noted that the plaintiff's permit authorized it to impound only public waters of the state consisting of stormwaters and flood waters of the Navasota River, and expressly prohibited it from impounding any part of the normal flow of the Navasota River. The plaintiff also constructed other dams that backed up water onto the land of other riparian owners. The court, relying on cases recognizing riparian rights, trespass laws, 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 dams by an appropriator faced with competing claims of riparian water rights by those owning land adjacent to the reservoir and/or original natural stream, and how a court sitting in equity must determine the appropriate result. The court, in essence, denied the rights of the appropriator while recognizing assertable claims by an riparian. The result did not provide guidance to water rights holders in the State.

These cases illustrate the difficulties encountered in the courts when individual water rights claimants sought court enforcement of their rights against other individual water rights holders without involving all others who may be impacted on the stream or a segment of the stream. These cases were often cited as declaring the existing water law after the 1913–1925 Acts, but frustration and confusion continued 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. In the 1950s the state experienced a drought of record which resulted in litigation on a large stream segment of the Rio Grande, and led to clarification and future development of Texas water law.

D. Riparian Rights Revisited and Court Adjudication

1. State v. Valmont Plantations

The *Motl* decision, which recognized the commonlaw riparian right to irrigation, remained the law until 1962, when the court decided *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *op. adopted*, 355 S.W.2d 502 (Tex. 1962). *Valmont* was a case between appropriators and commonlaw riparian rights claimants on the

Rio Grande, which had been severed as a separate cause arising out of *State v. Hidalgo County Water Control & Improvement District No. 18*, 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.). This case involved all water rights claimants on the Rio Grande below Falcon Dam, downstream of Laredo, Texas, to the Gulf of Mexico.

The *Motl* decision had been followed by the courts and many had relied upon the existence of the riparian right to irrigation in making long range business decisions. As noted by Chief Justice Murray in his *Valmont* dissent, *Motl v. Boyd* had been cited seventy-eight times by Texas courts since 1926, and "there can be no doubt that the bench and bar of this State accepted such law as settled, and followed it up to the present time." *Valmont*, 346 S.W.2d at 883. Nonetheless, the Texas Supreme Court, having squarely before it the issue of the existence of a commonlaw riparian right to irrigation under Spanish and Mexican law, and having considerably more evidence and information about Spanish and Mexican law than were available to the 1926 *Motl* court, determined the law differently.

In a thoroughly considered and exhaustive study of Spanish and Mexican law, the *Valmont* court concluded that "(1) rights under titles from Spain, Mexico and Tamaulipas are governed by the law of the sovereign when the grants were made, (2) those sovereigns did not have a system of riparian irrigation rights based upon or similar to the common law right to irrigate, (3) the grants involved in this suit were not made with the implied intent or agreement that the right to irrigate was appurtenant to the lands, and (4) [referring to *Motl v. Boyd*] this issue has never before been presented to a Texas Court for decision and there is no *stare decisis* on the subject." 346 S.W.2d at 881–82. The *Valmont* case clarified the classes of water rights claims in the dual system of water rights as follows: (1) rights asserted under permits and certified filings, (2) common-law riparian rights pertaining to land granted

by the Republic of Texas or the state between 1840 and prior to July 9, 1895, and (3) riparian rights to irrigation under Spanish and Mexican land grants where the right of irrigation was expressly granted.

2. State v. Hidalgo County Water Control & Improvement District No. 18

Another important case from which *Valmont* arose is *State v. Hidalgo County Water Control & Improvement District No. 18*, 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.), often referred to as the *Valley Water* case. The *Valley Water* case emphasized the need for more efficient water rights adjudication. The *Valley Water* case was an injunction case, similar to earlier cases seeking clarification of water rights. This was, however, the first court adjudication among *all* water rights claimants in an independent segment of a stream, that portion of the Lower Rio Grande downstream of Falcon Reservoir. It arose during the drought in the 1950s and took more than thirty years to decide. It involved roughly 3,000 parties, all potentially adverse to one another, and cost an estimated $10 million in court costs and attorney's fees. *Administrative Government in Texas—Current Problems*, 47 Texas L. Rev. 804, 875 (1969).

The background of this case involved parties who were seeking a right to a limited supply of water. It involved years of litigation between individual parties making individual claims to water rights adverse to all other party claimants. *See Hidalgo & Cameron Counties Water Control & Improvement District No. 9 v. Starley*, 373 S.W.2d 731 (Tex. 1964); *Hidalgo County Water Improvement District No. 2 v. Blalock*, 301 S.W.2d 593 (Tex. 1957); *Maverick County Water Control & Improvement District No. 1 v. City of Laredo*, 346 S.W.2d 886 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); *Hidalgo County Water*

Improvement District No. 2 v. Cameron County Water Control & Improvement District No. 5, 253 S.W.2d 294 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.). In this case a stream-wide approach was taken by the State filing an injunction action against all of the water rights claimants to adjudicate all water rights in the river segment below and including Falcon Reservoir.

In this case, 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 court orders. Recognizing the contradictory and incompatible issues resulting from the dual system of water rights, initially the court severed the riparian water rights claims from the suit and tried them separately in the *Valmont* case discussed above. After *Valmont* was resolved, the trial court in the *Valley Water* case focused on appropriative rights. The trial court ultimately addressed appropriative rights and other claims. Its judgment, as modified and affirmed on appeal, (1) set aside a water reserve for municipal, industrial, and 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 latter 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 observing that the existing appropriative rights in the Lower Rio Grande were to divert from a free-flowing stream. However, the Lower Rio Grande had been transformed to a controlled stream by dams built by the federal government.

A significant lesson learned during the course of these proceedings was that without some mechanism to organize the case from an evidentiary perspective, through required

maps and identification of parties and land, 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, the attorney general and the Texas Water Commission 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 included 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 the streams. *See* Garland F. 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); Corwin W. Johnson, *Adjudication of Water Rights*, 42 Texas L. Rev. 121 (1963). This experience, coupled with earlier difficulty in the court cases dealing with disputes between water rights claimants and the need to quantify and define existing water rights, led to the passage of a 1967 Adjudication Act.

E. Water Rights Adjudication Act of 1967

1. Background

To understand the impact of the Adjudication Act one must consider the history of adjudication of water rights in Texas. The background of the Adjudication Act began with the Irrigation Act of 1917, which contained adjudication provisions which were patterned after the then existing Wyoming system of adjudication of statutory surface water rights. Implementation of these adjudication provisions, however, was thwarted in 1921 when the Texas Supreme Court held, as discussed above, that this statutory procedure was unconstitutional

under constitutional separation-of-powers principles. *Board of Water Engineers v. McKnight*, 229 S.W. 301 (Tex. 1921).

The *McKnight* case arose from a petition filed under the 1917 Act with the Board of Water Engineers by a riparian water rights claimant claiming he was entitled to receive water from the Pecos River from a canal company that claimed rights by appropriation. The hearing in the case was held while there was a pending suit in federal court seeking to adjudicate water rights on the Pecos River involving the *McKnight* parties and other parties. Also pending at the time, was another suit in district court in Reeves County by Ward County District No. 1 against the Farmers Independent Canal Company to determine the relative rights of claimants to waters of the Pecos. *See McKnight v. Pecos & Torah Lake Irrigation Co.*, 207 S.W. 599 (Tex. Civ. App.—El Paso 1918), *aff'd*, 301 S.W. 299 (Tex. 1921).

In *McKnight*, the plaintiff sought an injunction, contending that sections 105–32 of the 1917 Act were unconstitutional. The trial court denied the injunction, but on appeal, the injunction was granted which was affirmed by the Texas Supreme Court. The court found that the legislature had unconstitutionally undertaken to empower the Board of Water Engineers with judicial power to adjudicate vested water rights, except for domestic and livestock water. This power gave the same effect to the board's determination, when not appealed, as is given to a judgment of a court of competent jurisdiction, thereby violating the constitution's separation-of-powers doctrine.

It is noted that the *McKnight* court did not mention or discuss the 1917 Conservation Amendment, which in the meantime, was approved by Texas voters because the underlying adjudication proceeding was commenced prior to adoption of the amendment. Significantly, this constitutional amendment gave the legislature control over the development and conser-

vation of water resources and the production of oil and gas. It is also noted that later, in *Corzelius v. Harrell*, 186 S.W.2d 961 (Tex. 1945), the court recognized that the *McKnight* decision construed only the adjudication provisions of the 1917 Act, which were effective June 19, 1917. If the *McKnight* court had considered the Conservation Amendment, which applied to all natural resources of the state and made them "public rights and duties" and directed that "the Legislature shall pass all such laws as may be appropriate thereto," the decision may have been different. In *Corzelius*, the court upheld the Railroad Commission's regulatory power to control drilling of oil and gas wells. In holding that the Conservation Amendment supported the legislative grant of such power to an administrative agency, the court held that the *McKnight* case was not controlling and that the separation-of-powers ruling in *McKnight* to such extent was overruled.

The *McKnight* decision undermined the authority of the Board of Water Engineers and thwarted the orderly development of the state's surface water resources, creating a desert in surface water law for some forty years. From 1921 to 1945 the board ceased to function in the role of quantifying and managing surface water rights. The Texas Supreme Court later observed that water law in Texas before 1967 "was in a chaotic state." *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 439 (Tex. 1982).

While the *Valley Water* case was in progress (see section D.2 above), a former attorney general and governor of Texas, sitting as a federal district judge, commented:

> The Texas water laws and decisions are in hopeless confusion; . . . their application and administration would be difficult . . .; said laws confer little, if any, real authority upon the State Board of Engineers; that the Board has granted permits on

> many streams . . . very few of which have been canceled, in such numbers and for such quantities that if riparian rights are given the full effect for which plaintiffs contend, practically every drop of water, normal flow, or flood, is "bespoken."

Martinez v. Maverick County Water Control & Improvement District No. 1, 219 F.2d 666, 670 (5th Cir. 1955) (quoting Judge James V. Allred's memorandum opinion from the district court). *See generally* A.A. White & Will Wilson, *The Flow and Underflow of Motl v. Boyd—The Problem*, 9 S.W. L.J. 1 (1955); *The Flow and Underflow of Motl v. Boyd—The Conclusion*, 9 S.W. L.J. 377 (1955).

Following the 1950's drought of record, the legislature again tried to delegate to the Board of Water Engineers the power to adjudicate water rights. *See* Stahle & Cleaveland, at 66. In 1953, while the *Valley Water* case was in process, article 7477 of the Texas Civil Statutes was amended. *See* Act approved June 8, 1953, 53d Leg., R.S., ch. 357, §§ 12, 13. Under article 7477, the board's determinations of water rights would not be final. Such findings could be appealed de novo, and the court could modify them. The legislature was trying to circumvent the *McKnight* ruling, which held that under the 1917 Act, because the board's findings on water rights claims were final with no right to appeal, the findings violated the separation-of-powers doctrine.

Article 7477 was, however, subsequently invalidated by the Texas Supreme Court in *Southern Canal Co. v. Texas Board of Water Engineers*, 318 S.W.2d 619 (Tex. 1958). In *Southern Canal*, the court found that the 1953 Act required application of two different but irreconcilable standards of review—that is, the preponderance of evidence standard of review in a trial de novo appeal as opposed to the substantial evidence standard of review, which is

applicable to decisions by the board and other agencies of the state on appeal to the courts. Again, the legislature's attempt to quantify and evaluate water rights was frustrated.

In 1964, the Texas Water Commission requested that the Texas Research League conduct a study of the operation of the Board of Water Engineers and recommend changes to more effectively secure development of the state's water resources. Volume II 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 Texas Research League study. It followed the Wyoming adjudication model, 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 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 on containing provisions for automatic appeal to court on a trial de novo basis. It was enacted by the 60th Texas Legislature and signed by Governor Connelly on April 13, 1967. *See* Act approved Apr. 13, 1967, 60th Leg., R.S., ch. 45; *see also In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 445 (Tex. 1982).

2. The Water Rights Adjudication Act

The Water Rights Adjudication Act, codified at Texas Water Code chapter 11, subchapter G, established a statewide process. All water rights claimants, except domestic and livestock

claimants (whether statutory claimants or riparian claimants), were required to file sworn claims by September 1, 1969. *See* Tex. Water Code § 11.303(c). Certain riparian claimants were required to file by July 1, 1971. *See* Tex. Water Code § 11.303(e). Nonstatutory claims were limited to maximum beneficial use between 1963 and 1967. *See* Tex. Water Code § 11.303(b). The Act did not recognize any water rights claim that did not exist before August 28, 1967, and expressly excluded claims for domestic or livestock uses. Tex. Water Code § 11.303(k), (*l*).

The Act addressed the dual system of water rights and was an improvement over previous legislation, which addressed only statutory rights. Under this new process, when a claim was filed, the then Texas Water Commission staff completed an investigative report cataloging and describing all claims previously filed. These claims were mapped by aerial photography of the river segment and surrounding areas, and all claims of water users on the segment were located on the map. When the commission completed its investigation of a stream or segment, there was notice, hearings were held and a preliminary determination issued. The Act established the procedure for contests and exceptions to the preliminary determination, resulting in a final determination. The Act allowed for a proper initial adjudication and a narrowing of the issues by administrative determination for later court decisions only on those issues, as identified by the parties, during the adjudication process. This administrative process eliminated the previous chaotic judicial process of adjudication. The final determination was automatically filed in district court, where it was considered de novo on issues defined during the administrative process and presented to the court. *See* Doug Caroom & Paul Elliott, *Water Rights Adjudication—Texas Style*, 44 Tex. B.J. 1183 (1981).

The first adjudication under the Act concerned the middle segment of the Rio Grande between Falcon Reservoir and Amistad Reservoir immediately upstream from the court-adjudicated rights in the *Valley Water* case. At the beginning, the agency's commissioners heard these adjudication cases themselves, but because of the overwhelming tasks involved, later the cases were assigned to agency hearing officers. The agency next conducted the Upper Rio Grande adjudication for the segment above Amistad Reservoir and below Fort Quitman, Texas, and continued by adjudicating all Texas rivers. The adjudication process was completed in 2007 with the adjudication of the Upper Rio Grande segment above Fort Quitman, Texas, to the state line. *In re Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, Cause No. 2006–3219, 327th Judicial District Court, El Paso.

Upon completion of each adjudication case, which was marked by court judgment or decree the agency issued certificates of adjudication to all parties who were adjudicated a water right in the proceedings. The certificate is required to quantify the basic extent of the right and any other findings made in the adjudication case. *See* Tex. Water Code § 11.323. A certificate evidences an existing water right in the stream segment that is adjudicated. Permits issued subsequent to an adjudication on a stream segment are now simply added to the records as a water right and are subject to the same regulation as adjudicated rights. *See* Tex. Water Code § 11.336. See Chapter 9 of this book.

3. Watermasters

A significant component of the Water Rights Adjudication Act was that once rights were adjudicated, they would be enforced by a watermaster. Establishment of the watermas-

ter program was intended to assure those holding adjudicated water rights that their rights would be enforced and protected. The watermaster concept of enforcement derived from the experiences in the *Valley Water* case, 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 at sections 11.325–.333, which empowered the agency, once rights were adjudicated, to appoint a watermaster to oversee water use using the regulatory tools authorized by statute.

The watermaster provisions have not been implemented statewide as provided by the Act. There is a watermaster program on the Rio Grande, implemented initially by the court in the *Valley Water* case and later by the agency in the Middle and Upper Rio Grande adjudications. The South Texas Watermaster Program, implemented in the adjudication process, originally covered the Colorado, Guadalupe, San Antonio, and Nueces rivers. Later, the Lavaca and Navidad rivers were added by a commission order based on a petition of water rights holders on those rivers. The program now also covers the Concho Watershed pursuant to petitions filed under Texas Water Code chapter 11, subchapter I, and by legislation in 2005, adding sections 11.551–.560 to the Texas Water Code, which established the Concho River Watermaster Program. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 749; *see also City of San Angelo v. Texas Commission on Environmental Quality,* Cause No. GV4-03796 (53d Dist. Ct., Travis County, Tex. 2005); *City of San Angelo v. Texas Natural Resources Conservation Commission*, 92 S.W.3d 624 (Tex. App.—Austin 2002, no pet.).

The 82nd Texas Legislature in 2011 addressed the potential role of watermasters in managing water rights in other River basins in the state, and passed legislation amending the

Adjudication Act by adding Section 11.326(g)(h), Texas Water Code. This provision requires, in river basins in which no watermaster has been appointed, that the executive director of the Texas Commission on Environmental Quality evaluate each river basin at least once every 5 years to determine whether a watermaster should be appointed, and these findings and recommendations shall be included in the agency's biennial report to the Legislature.

The agency has completed these evaluations in several of the river basins without recommending the establishment of a watermaster program. In April 9, 2014, however, the agency granted a Petition for a watermaster in the Lower Brazos River Basin. See www.tceq.texas.gov/assets/public/compliance/field-ops/wm. See Chapter 10 of this book for further discussion of watermasters.

4. Cases Decided in the Adjudication Process

Most adjudication cases were resolved at the district court level and were not appealed. This shows that many complex water rights issues were resolved to the satisfaction of the claimants on a stream or segment of a stream at either the agency or district court level. There are a few decisions, however, of note.

(a) Extent of Riparian Rights

The first case under the Adjudication Act to reach the appellate courts was *In re Adjudication of Water Rights of Cibolo Creek Watershed of San Antonio River Basin*, 568 S.W.2d 155 (Tex. Civ. App—San Antonio 1978, no writ). One water rights claimant on the Cibolo Creek, who had been recognized a right based on prescription and equity on one tract of land but denied a right on another tract, challenged the district court's decision. The appellant as-

serted a riparian right to the land under Spanish and successor land grant and/or equitable rights. He further claimed that the Adjudication Act was unconstitutional. The appellate court, citing the *Valmont* case, held that the claimant did not have a riparian right because his riparian land grant did not specifically grant riparian irrigation rights. This is the first case that applied *Valmont* to a river other than the Rio Grande. The court also held that the claimant did not possess an equitable right under the *Valley Water* case because the unique circumstances applicable in the *Valley Water* case did not exist in this case. Finally, the court held that because the claimant had no vested property right, he did not have standing to raise the constitutionality of the Adjudication Act.

Four years later, the Supreme Court in *In re Adjudication of Water Rights in the Llano River Watershed of the Colorado River Basin*, 642 S.W.2d 446 (Tex. 1982), affirmed that riparian rights to irrigation cannot be claimed on lands granted by the state after July 1, 1895, the effective date of the Irrigation Act of 1895, in which the state reserved the ordinary flow of water in streams. "The Act stated that the ordinary or underflow of a river or stream, as well as the storm or rain waters were the property of the public appropriation for irrigation purposes. The manner of acquiring water rights after that date was by appropriation and not by force of the riparian location of land." 642 S.W.2d at 448. This holding finally confirmed the legislature's intent in the 1895 Act and subsequent statutes to limit riparian claims to grants or patents issued prior to 1895.

Subsequently, in *In re Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250 (Tex. 1984), the Supreme Court affirmed the commission's holding that a riparian was restricted to use during the 1963–67 period and the extended period provided in the Act. After an extensive discussion of the *Valmont* case,

court decisions since then, and Spanish and Mexican law, the court held that a riparian claimant under an 1833 Mexican grant did not own all of the waters of Medio Creek (tributary to the Medina River) and could be adjudicated only the amount of water shown to have been used during the statutory period.

Later, in *In re Adjudication of Water Rights of Lower Guadalupe River Segment*, 730 S.W.2d 64 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.), the issue involved whether the water in a natural lake was public or private water. The court held that the water in the lake was public water based upon the definition of the "state's water" contained in the Texas statutes beginning with the 1889 Act and statutes existing at the time the claimant acquired the land.

(b) Merger of Riparian and Appropriative Rights

As noted above, the purpose of the Adjudication Act was to unify the previous dual system of surface water law and to inventory and quantify the basic extent and amount of existing water rights. To quantify surface water law, the Act provided that riparian rights, other than domestic and livestock, be limited in amount of authorized use to historical beneficial use, and for water rights administration purposes, the commission additionally determined that merger of these riparian rights into appropriative rights was necessary to unify surface water law. Therefore, not long after the decision in the *Cibolo Creek* case discussed above, the commission declared that the assignment of time priorities to proven riparian rights was essential to a workable scheme of proper state water rights management, and priority dates were assigned to riparian rights proven in the adjudication and included in certificates of adjudication. *See Final Determination before the Texas Water Commission in the matter of the*

Middle Colorado River segment of the Colorado River Basin (1981) (approved at the District Court level).

(c) Adjudication Act Constitutional

In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438 (Tex. 1982), was the pivotal case that confirmed the constitutionality of the Adjudication Act. The court held that the Act did not violate the doctrine of separation of powers because the administrative determination was subject to automatic appeal and trial de novo. It further determined that riparian water rights claimants could be restricted to a defined water right based on use during a test period. Such restriction did not constitute a taking of property without just compensation because the claimants received due process notice and hearing and there was an automatic appeal of the administrative determination and trial de novo.

(d) Equitable and Pueblo Water Rights

The appeal in *In re Contests of the City of Laredo, to the Adjudication of Water Rights in the Middle Rio Grande Basin & Contributing Tributaries*, 675 S.W.2d 257 (Tex. App.—Austin 1984, writ ref'd n.r.e.), considered the commission decision that the equitable water rights concept adopted in the *Valley Water* case extended to rights in the Middle Rio Grande because of the unique circumstances on the Rio Grande. The court recognized that the commission lacked the equitable powers of a court to recognize an equitable right; nevertheless, upon review of the commission's finding of equitable water rights on the Rio Grande it affirmed the Commission's finding that the right should be recognized elsewhere in

this segment of the River. The court reviewed the laws of Spain and Mexico and court decisions in California, and held that the law of New Spain did not expressly create a municipal water right in the nature of a pueblo water right on the Rio Grande.

(e) Appropriative Rights Issues

In adjudicating the basic extent and amount of an existing appropriative right, such as a certified filing or permit, the commission in its determination, and the court in considering the determination, did not make findings regarding all of the terms and conditions of a permit or certified filing. In such cases, the commission observed in a final determination that—

> the most significant terms and conditions stated in permits or amended certified filings are specifically included in the findings and/or conclusions for each rights. However, all of the terms and conditions stated in permits or amended certified filings shall continue in full force and effect, except for obsolete, irrelevant or immaterial terms and conditions which will be deleted from certificates of adjudication when they are issued.

Final Determination of all Claims of Water Rights in the Brazos III Segment of the Brazos River Basin 5 (1985) (see also paragraph. II, pg. 11 of the Final Determination, regarding merger of riparian rights with appropriative rights). The final determination was affirmed in *In re Adjudication of Water Rights of the Brazos III Segment of the Brazos River Basin*, 746 S.W.2d 207 (Tex. 1988).

In *In re Contests of City of Eagle Pass, to the Adjudication of Water Rights in Middle Rio Grande Basin & Contributing Texas Tributaries*, 680 S.W.2d 853 (Tex. App.—Austin 1984, writ ref'd n.r.e.), the court affirmed the commission's adjudication involving the volume of water to which an appropriative claim is entitled. In this case, the city sought an amount of

water equivalent to a water duty requirement per acre, taking into account future use and needs. The commission allowed the amount of water perfected by the city's actual maximum use prior to August 1967. The court applied the rules of the appropriation doctrine, which measures the extent of the right as the maximum amount beneficially used, after reasonable development, pursuant to the appropriative claim prior to 1967. This, the court held, is the measure of a perfected right under the prior appropriation doctrine. The effect of the court's holding restricted the water right to past beneficial use without provision for future growth and needs.

The *City of Eagle Pass* case was the only adjudication case that reached the appellate courts pertaining to basic issues involved in appropriative rights claims. All others dealt with riparian rights issues and the constitutionality of the Act in relation to riparian rights. Other than those in the *City of Eagle Pass* case, all claimants to appropriative rights were satisfied with either the commission's determination or a district court judgment. This shows that a goal of the Adjudication Act was successful: It reached an amicable resolution to many complex issues that earlier courts found difficult to resolve in a judicial setting. The Act served its purpose of establishing a statutory process that met due process and separation-of-powers requirements to finally adjudicate existing water rights.

5. Goals of the Adjudication Act

The goals of the Adjudication Act were to quantify and inventory all water rights, which were necessary for the management of water resources. Under the Act, the adjudication process assigned an acre-foot limitation and a priority date to all water rights, and identified the

ownership, location of diversion on the stream, diversion rate, and other details so that all water rights could be quantified and identified. The Act included both statutory and nonstatutory claims, with certain exceptions. The goals were accomplished by requiring the filing of claims and providing proof of use during the periods of time provided in the Act.

The Act did much more than establish a procedure for adjudication of claims. It also had the effect of limiting riparian rights, which were previously unquantified and traditionally considered not to be dependent on use, to the maximum demonstrated beneficial use during a prescribed period prior to the effective date of the Act. *See* Tex. Water Code § 11.303. Thus, the Act transformed riparian rights from a right to make an unquantified, reasonable use of water into a right to make a beneficial use of a specified quantity of water with a first use priority date. The Act transformed the existing chaotic dual system of water rights to a more manageable single statutory rights system, with some exceptions discussed below and in Chapters 9 and 33 of this book. In this respect, the Act accomplished its goals.

F. The Adjudication Act: Special Issues

The Adjudication Act and the subsequent adjudication were not cure-alls. They resolved many problems caused by the dual system of water rights and paved the way for better water management, but they left some issues unaddressed. This section discusses selected statutory exemptions from the appropriation process, irrigation canal rights, the Wagstaff Act, and termination of water rights. Some of these topics have only historical significance, whereas others continue to be litigated.

1. Domestic and Livestock Use

The Adjudication Act specifically excluded the adjudication of domestic and livestock use claims. Study of the historical background with specific attention to domestic and livestock use is necessary to understand the nature of these claims. As summarized below, the right to use water for domestic and livestock purposes on land that abuts a stream developed separately from the same right for other uses on land that abuts a stream and uses on land which does not abut a stream.

a. Spanish and Mexican Law Influence

Early Spanish and Mexican law generally provided for water use for domestic and livestock purposes in the ditch or acequias systems. Under the laws of Spain, certain common water uses did not require a grant from the sovereign. Waters in the Rio Grande could be used by all for "drinking by men and animals; as a highway, for the navigation of boats and sailing ships; for fishing; and for domestic necessities." *Valmont Plantations*, 346 S.W.2d at 854 n.1. "[T]he waters of navigable rivers" could be used by all "persons in common." 346 S.W.2d at 857. Common uses included navigation, mooring of boats, making repairs on ships or sails, landing merchandise, fishing, and drying of nets. 346 S.W.2d at 857. All waters of public rivers were for public and common use, and anyone could use the water for domestic purposes. 346 S.W.2d at 860–61 (citing with approval the Spanish commentator Lasso de la Vega); *see also In re Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 254 (Tex. 1984) (A grant from the sovereign was not "needed to take water even from a public stream for domestic or personal use," citing

Lasso de la Vega, *Reglamento General De Las Medidas de Aguas*, *reprinted in* M. Galvan, *Ordenanzas de -Tierras y Aguas* 155–57 (1844).

b. Statutory and Common-Law Background of Domestic and Livestock Use Claims

The Irrigation Act of 1889 did not mention domestic and livestock use except to the extent that an appropriator of water "shall first make available his said land for agricultural or grazing purposes, and shall provide cisterns, wells, or storage reservoirs for water for domestic purposes." *See* Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 88, § 10, 1889 Tex. Gen. Laws 100, 101–02, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1128–30. This reference to livestock and domestic use is in the context of the prior appropriation doctrine and meant that the appropriator was to make water available for domestic use within the appropriator's water delivery system. The intent was to provide domestic water incident to the irrigation enterprise, which in the late 1800s and early 1900s most often included water for surrounding towns, villages, and cities.

The Irrigation Act of 1895 went further by protecting domestic drinking and livestock water use from any right acquired by an appropriation of surface water, by providing:

> Whenever any person, corporation or association of persons shall become entitled to the use of any water of any river, stream, canyon, or ravine, or the storm or rain water hereinbefore described, it shall be unlawful for any person, corporation or association of persons to appropriate or divert any such water in any way, *except that the owner whose land abuts on a running stream may use such water there-*

> *from as may be necessary for drinking purposes for himself, family and employes,[sic] and for drinking purposes for his and their livestock . . . .*

See Act of Mar. 9, 1895, 24th Leg., R.S., ch. 21, § 10, 1895 Tex. Gen. Laws 21, 23, *reprinted in* 10 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 751, 753 (emphasis added). This was the first legislative declaration of the rights of domestic and livestock users to surface water. Interestingly, it is stated in terms of an exception or exemption from the statute's enforcement of a lawful appropriator's rights to take water from the stream. It is a limited exemption; it applies only to those who own land that abuts a stream, the landowner's family and employees, and the landowner's livestock, and it restricts the use of water to these purposes only.

During this early period, development of the law controlling domestic and livestock use was likely influenced by how this right was recognized in arid regions in the western United States. As stated in a well recognized 1912 water law treatise:

> In all the Western States water may be appropriated for domestic purposes. This use may be defined as a use similar to that which a riparian owner has, under the common law, to take water for himself, his family, or his stock, and the like. (Citing *Crawford v. Hathaway* (Hall), 67 Neb. 325, 93 N.W. Rep. 781, *Montrose Canal Co. v. Loutsen Leizer D. Co.*, 23 Colo. 223, 48 Pac. Rep. 53, where the Nebraska court held that the appropriation by a company of a large portion of the waters of a stream, for the purposes of supplying water to a municipality for general use, including sprinkling the streets, providing power for a light plant, for flushing sewers, is not a domestic use. (This is consistent with current Texas water law requiring a municipality to acquire an appropriative right.) The right is based, however, upon the same differences, compared to the

right under the common law, as are the other rights which may be acquired to the use of water under the common law and under the Arid Region Doctrine of appropriation. The first is based upon the ownership of the soil through which or adjoining which the stream flows, as an incident thereto, while the second is by virtue of an appropriation for that purpose under the doctrine of appropriation, and without regard to ownership on the stream. Even without statutory regulations, the right to appropriate water for domestic purposes is not without its limitations. The water must be used in a reasonable manner and no more can be appropriated for a purpose, even where it is prior, than will reasonably meet the demands. It is such a use as ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate the diversion of large quantities of water in canals or pipe lines. Clesson S. Kinney, *The Law of Irrigation and Water Rights* § 692 (2d ed. 1912) [hereinafter Kinney].

In speaking of domestic and livestock use, the law also makes a distinction between natural and artificial use. Natural uses are uses necessary to sustain life, as opposed to artificial uses, which do not depend on necessities but bear on the question of business, profit, pleasure, or comfort. Domestic and livestock use was given preference over artificial uses, whether appropriative or riparian rights. This preference was based on a reasonable use rule, taking into consideration the nature and extent of the use and all the other facts surrounding the particular use involved. *See* Kinney, § 487. Many of these concepts found their way into Texas water law.

The 1925 Act authorized the appropriation of waters of the state "for public parcels, game preserves, recreation and pleasure resorts, power and water supply for industrial purposes and power and water supply for industrial purposes and *for domestic use*." Act ap-

proved March 28, 1925, 30th Leg., R.S., ch. 136, § 1 (emphasis added). This provision was derived from the 1913 Act and the 1917 and 1918 Acts, which later became article 7470 of the Texas Civil Statutes. These provisions allow for a permit or certified filing to appropriate water for domestic use on land that does not abut a stream and for artificial uses. These provisions have continued through codification in 1971, when they became section 5.001 and now section 11.001 of the Texas Water Code. The statutes provide for the appropriation of water for domestic use in cases where the use of water for domestic and livestock use is not on land that abuts a stream and give natural uses the first priority in the case of competing applications for a permit.

The agency rules defined domestic and livestock use in various versions both prior to and after the Adjudication Act. This is notable because domestic and livestock use was excepted from adjudication. The earlier rules defined domestic and livestock use as it was traditionally understood as limited to household use and use by domestic animals, which seemingly applies to the Adjudication Act exclusion. Current rules have divided the definition of domestic use from that of livestock use consistent with statutory changes dealing with statutory permit exemptions. See discussion below. The current rules define domestic use as:

> Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or re-

ceived or for which the product of the activity is sold. 30 Tex. Admin. Code § 297.1(18)

It is noted that the first part of this definition includes the early common law and statutory traditional definition of the domestic and livestock use where livestock use is limited to domestic livestock and does not refer to location of use on land which abuts a stream.

The rules currently define livestock use separate from domestic livestock use as follows:

> The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and §71.001, respectively, of the Parks and Wildlife Code.

30 Tex. Admin. Code § 297.1(28).

Section 297.21(a) of the Rules provides that a person who owns land adjacent to a stream may directly divert and use water from the stream for domestic and livestock use without having to obtain a permit. 30 Tex. Admin. Code §§ 297.21(a). Also, section 304.21 (c)(3) allows a watermaster to protect domestic and livestock uses in times of low flows. *See* 30 Tex. Admin. Code § 304.21 (c)(3). These provisions deal with domestic and livestock use consistent with prior law. Additionally, permits issued after the 1913 Act are generally made subject to superior rights, and some have equated this to the exempted domestic and livestock rights on property that abuts a stream.

c. Domestic and Livestock Rights: Summary

The common law, state statutory law, and early Spanish and Mexican law recognize a common-to-all right, excluded from the appropriation and permitting system, to take water from a stream that abuts one's property for one's own domestic use and domestic livestock use.

Use of water for domestic and livestock purposes on land that does not abut a stream may be appropriated from the stream pursuant to the appropriation and permitting system unless exempted by statute, see discussion below with respect to domestic and livestock reservoirs. As applied to individual factual situations, there remains questions as to the application of the law related to domestic and livestock use which are yet to be determined. See also Chapter 27 for additional discussion.

2. Domestic and Livestock Reservoirs

The Adjudication Act does not cover other exempted statutory claims, such as certain reservoirs, including domestic and livestock reservoirs. This section summarizes the development of this statutory exemption.

The first clear recognition of a statutory water right outside the appropriation law requirements was a landowner's right to construct a dam and impound water on the landowner's land for a limited use of the water impounded whether riparian or not. It was first recognized in the Irrigation Act of 1895 as an exception to the appropriation system:

> [E]xcept that the owner whose land abuts on a running stream may use such water therefrom as may be necessary for drinking purposes for himself, family and employes [sic], and for drinking purposes for his and their livestock, *and* any one

> whose land may be located within the area of the watershed from which the storm or rain waters are collected may construct on his land such dams, reservoirs or lakes as may be necessary for the storage of water *for drinking purposes for such owner of land, his family and employes [sic], and for his and their livestock* . . . .

Act of March 9, 1895, 24th Leg., R.S., ch. 21, § 10, 1895 Tex. Gen. Laws 21, 23, *reprinted in* 10 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 751, 753 (emphasis added). This law recognized the common law domestic and livestock use and exemption discussed above, and further authorized a reservoir with limited use on the landowner's land. The reservoir's use was limited to the landowner's and the landowner's livestock drinking purposes.

This provision was repealed by the 1913 Irrigation Act, but a similar right was established in the Irrigation Act of 1917. Again, the right was authorized by exemptive language. The 1917 Act included a volume of water limitation but no reference to the nature of use of the water:

> [P]rovided, however, that nothing in this Section or in this Act shall affect or restrict the right of any person or persons, owning land in this State to construct on his own property any dam or reservoir which would impound or contain less than *five hundred acre-feet of water*.

Act of March 19, 1917, 35th Leg., R.S., ch. 88, § 16 (article 7496 of the Texas Civil Statutes) (emphasis added). Thus, the initial reservoir exemption in 1895 was for domestic and livestock use. It was repealed in 1913. For four years, the exemptive right did not exist. When reintroduced in 1917, it did *not* mention the purposes of use; instead, the exemption allowed a reservoir capacity of five hundred acre-feet.

In 1925, the exemption became an affirmative authorization but with a smaller volume limitation and limited purposes as follows: "Any one may construct on his own property a dam and reservoir to impound or contain not to exceed two hundred and fifty acre-feet of water for domestic and livestock purposes without the necessity of securing a permit therefor." Act approved March 28, 1925, 39th Leg., R.S., ch. 136, § 5 (article 7500a of the Texas Civil Statues). The attorney general ruled the 1925 Act unconstitutional, so the nature and extent of this exemption were clouded until it was reenacted by the legislature in 1941, using the following language: "Anyone may construct on his own property a dam and reservoir to impound or contain not to exceed fifty (50) acre-feet of water for domestic and livestock purposes without the necessity of securing a permit therefor." Act of March 14, 1941, 47th Leg., R.S., ch. 37, § 1.

In *City of Anson v. Arnett*, 250 S.W.2d 450 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.), the court was faced with interpreting these different statutes pertaining to reservoirs. A landowner constructed a dam on an unnamed watershed in 1934 and 1935 to impound one hundred acre-feet of water. Over time, the dam had fallen into disrepair and at times could hold only fifty acre-feet. In 1951, the dam was repaired to impound about ninety acre-feet. The City sued to enjoin the landowner from pumping more than fifty acre-feet of water from the reservoir behind the dam for livestock and domestic use. The City argued that the 1925 Act was void, apparently based on the attorney general's opinion, and that any rights of the landowner prior to passage of the 1941 Act must be governed by article 7496, enacted in 1917.

The court did not rule on the validity of the 1925 Act because, in the court's opinion, the amount of water impounded made such a determination unnecessary. The court summarized the City's argument as follows:

> [U]nder either the 1917 Act, or the Act of 1925, the only right given to a landowner was the right to construct on his land, without a permit, a dam or reservoir of the size indicated by the statute, but that neither of such Acts gave him the right to use the water impounded without a permit. *City of Anson*, 250 S.W.2d at 452.

The court rejected this argument, saying:

> Although dams may be built without the intent to use the water impounded, such as those constructed for the purpose of flood control, it is our opinion that the usual purpose for which a landowner builds a dam of the type under consideration is to use the water. The costs of the construction of such a dam would be needless expense to the landowner unless he could use the water impounded. 250 S.W.2d at 452–53.

Regardless of which statute controlled, article 7496 (enacted in 1917) or article 7500a (enacted in 1925), the capacity of the dam meant that it required no permit to construct. The court found that neither statute placed any restriction or limitation on the use of the water impounded by the dam and that even though neither statute specified that the impounded water could be used without a permit, the court held that such an intention was implied.

Because the size and purpose of use of the dam and reservoir had changed over time and the relevant statutes varied in the size and purpose of use requirements, the court also ad-

dressed the issue of which statute applied to the dam and reservoir. The court found that the 1941 Act did not apply, stating:

> The limitation of use imposed by [the 1941] Act plainly applies to dams constructed under the authority of the Act itself and not to dams which had been previously constructed. The rights of appellee Arnett were not affected by the 1941 Act since they were vested under prior laws and statutes. Under such statutes, it is our opinion that Arnett had the right to use water from his reservoir for the purposes and in the manner set out in the facts of his case. He also had the right to repair his dam to accomplish that end. 250 S.W.2d at 453.

Although the applicable statutes and facts are complicated, the court's holding in the *Arnett* case established that a water right to an exempt reservoir arises by virtue of its construction under the existing statute, within the capacity limitations and purposes of use provided by the existing statute, and that the reservoir must be constructed on land owned by the landowner whether riparian or not.

The legislature continued to modify the reservoir exemption. The acre-feet restriction was increased to two hundred acre-feet in 1953. *See* Act approved May 27, 1953, 53d Leg., R.S., ch. 235, § 1. In 1959, the law was amended to provide: "The owner of any such dam or reservoir wishing to take water from such dam or reservoir for any beneficial purpose or purposes other than domestic or livestock use . . . can seek a permit from the State." Act approved May 8, 1959, 56th Leg., R.S., ch. 151, § 1 (amending article 7500a of the Texas Civil Statutes).

A later case that considered the reservoir exemption is *Garrison v. Bexar-Medina-Atascosa Counties Water Improvement District No. 1*, 404 S.W.2d 376 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.). In this case, a permit authorizing a dam and reservoir on the west prong of the Medina River, a navigable stream, was invalidated. The court of appeals held that the state, not the landowner, owns the bed and banks of navigable streams. The Texas Supreme Court approved that portion of the court of appeals' opinion holding that the exemption from permitting (then article 7500a) did not apply to a navigable stream. 407 S.W.2d 771 (Tex. 1966). The supreme court ruled that any exemption from permitting for a dam and reservoir would be controlled by the statute at the time of construction but that such exemptions do not apply to navigable streams. For an exemption to apply, the dam must be located on the landowner's land; if on a navigable stream, a permit is required. Thus, under the common law established by the court, the statutory exemption from permitting such a reservoir does not apply when the dam and reservoir is on a navigable stream.

The law continued to evolve. In 1971, article 7500a was repealed and recodified as sections 5.140 and 5.141 of the Texas Water Code, which are currently section 11.142. Section 11.142 allows broader uses of the water in such an exempt reservoir, but it is still subject to the earlier court decisions.

The reservoir exemption to the appropriation and permitting system was created by statute. It is considered by the courts to give a landowner who constructs a dam and reservoir on his own property, to collect diffused water, or on a nonnavigable stream the right to impound a limited amount of water. The terms that control such an exemption are those found in the law that was in effect when the dam was constructed. This exemption under common law

does not apply to a navigable stream. See Chapter 33 for a discussion of reservoirs, including exempt reservoirs.

3. Irrigation Canal Rights

Certain other rights of landowners adjoining an appropriator's irrigation lands or facilities are of historical interest. Such claims were considered in the *Valley Water* case and possibly in adjudication cases that did not reach the appellate courts. Remnants of older statutes relating to this type of claim remain in the current statutes. The duty to provide water under reasonable terms and conditions at reasonable rates originated from these irrigation canal rights.

The early general and special legislative acts dealing with early irrigation companies, the 1889, 1895, 1913, 1917, and 1918 Acts, provided for the creation of private canal corporations to construct water diversion and distribution systems with the emphasis on delivery of water for irrigating land contiguous to the corporation's canal distribution system. *See* Hutchins, at 251. Later statutes governing the creation and operation of private canal corporations were found in article 7552, *et seq.*, *Vernon's Texas Civil Statutes.* The provisions relating to service of contiguous lands are now found in Texas Water Code sections 11.036–.041.

The court decisions that interpret and apply these statutes to claims of water rights are generally fact- and site-specific and involve questions of the relative rights of the canal company and individuals claiming the right to water from the canals. *See Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex. 1905); *Lakeside Irrigation Co. v. Buffington*, 168 S.W. 21 (Tex. Civ. App.—San Antonio 1914, writ ref'd); *American Rio Grande Land & Ir-*

rigation Co. v. Mercedes Plantation Co., 208 S.W. 904 (Tex. Comm'n App. 1919, judgm't adopted); *Knight v. Oldham*, 210 S.W. 567 (Tex. Civ. App.—El Paso 1919, writ ref'd); *Mudge v. Hughes*, 212 S.W. 819 (Tex. Civ. App.—San Antonio 1919, no writ); *McBride v. United Irrigation Co.*, 211 S.W. 498 (Tex. Civ. App.—San Antonio 1919, writ ref'd); *Edinburg Irrigation Co. v. Paschen*, 223 S.W. 329 (Tex. Civ. App.—San Antonio 1920), *aff'd*, 235 S.W. 1088 (Tex. Comm'n App. 1922); *Ball v. Rio Grande Canal Co.*, 256 S.W. 678 (Tex. Civ. App.—San Antonio 1923, writ ref'd); *Fairbanks v. Hidalgo County Water Improvement District No. 2*, 261 S.W. 542 (Tex. Civ. App.—San Antonio 1923, writ dism'd w.o.j.); *Chapman v. American Rio Grande Land & Irrigation Co.*, 271 S.W. 392 (Tex. Civ. App.—San Antonio 1925, writ ref'd); *Edinburg Irrigation Co. v. Ledbetter*, 206 S.W. 1088 (Tex. Comm'n App. 1926); *Van Horne v. Trousdale*, 10 S.W.2d 147 (Tex. Civ. App.—El Paso 1928, no writ); *Willis v. Neches Canal Co.*, 16 S.W.2d 266 (Tex. Comm'n App. 1929, judgm't adopted). These early cases generally construed the statutes to say that all landowners contiguous to a private canal company's distribution facilities have a right to demand the use of water from the canal company (or a successor water district) and are entitled to water service on reasonable terms and rates. *See* Hutchins, at 251–52, 271–72, 279–80 (and cases cited therein).

The duty of a canal company or irrigation company to provide water on reasonable terms and rates to landowners contiguous to the company's reservoirs and distribution facilities is reflected in Texas Water Code section 11.038. This basic provision had appeared in every irrigation act since 1889 with specific reference to the content of each act. In those statutes, the duty to provide water was tied to the right of the canal or irrigation company to

appropriate water and to the company's construction and maintenance of reservoir and distribution facilities as provided in each statute.

Private irrigation companies were the only facilities that were "constructed and maintained" under the statutes before 1918 and passage of the Conservation Amendment except for early irrigation districts established after the 1904 Constitution amendments, see discussion in III below. The facilities of water improvement districts and water control and improvement districts were constructed and maintained under later statutes after 1918. When a water district took over the facilities of a predecessor private irrigation company, these early statutes would not apply because the facilities were then maintained under post-1918 statutes, even though they may have been constructed by a private irrigation company under the pre-1918 statutes.

These historical canal corporation water service rights would appear to have limited applicability because most private canal companies in Texas have been converted into water districts ; however, this is not the case because the court in *State v. Hidalgo County Water Control & Improvement District No. 18*, 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.), recognized independent water rights in claimants that owned or held possessory rights to lands "adjoining or contiguous" to canals of a predecessor private irrigation company, even though their land was not later included in the boundaries of a successor water district. 443 S.W.2d at 748, 750–53. These landowners held permanent water supply contracts, recorded in the county records, with the predecessor private irrigation company and continued to receive deliveries of water from the successor water district. *See also Arneson v. Shary*, 32 S.W.2d 907 (Tex. Civ. App.—San Antonio, 1930, writ ref'd).

As mentioned above, during codification in 1971, the provisions dealing with private irrigation companies relating to service of contiguous lands were codified into what is now Texas Water Code sections 11.036–.041 this codification should not have changed the substantive meaning of the law it codified. Nevertheless, as codified, it appears to have changed the context and original aspect of these rights, because a court later held that these current code provisions were not limited to irrigation uses and private irrigation companies but included other uses, including municipal use, and the court extended the provisions and the duty to serve and deliver water at reasonable rates to municipal suppliers. *Texas Water Rights Commission v. City of Dallas*, 591 S.W.2d 609 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

The duty to delivery water and serve at reasonable rates and terms and conditions, which historically arose out of the canal company and irrigation company statutes as discussed above, has also been broadened to include other water suppliers and use of water. In *City of San Antonio v. Texas Water Commission*, 407 S.W.2d 752 (Tex. 1967), the Guadalupe-Blanco River Authority held a permit granting it "authority to appropriate, divert and use certain waters of the State as may be necessary when beneficially used for the purposes of municipal use." The court declared that the authority could not legally refuse to sell municipal water to any particular municipality. It had a duty to serve the public without discrimination and at reasonable rates. *See Allen v. Park Place Water, Light & Power Co.*, 266 S.W. 219 (Tex. Civ. App.—Galveston 1925, writ ref'd).

Thus the duty to provide water under reasonable terms and at reasonable rates found in today's Texas Water Code chapter 11 originated historically in the state's desire to encourage agriculture and irrigation and support the construction and maintenance of irrigation water-

works designed for this purpose. See Chapter 37 of this book for a discussion of wholesale water suppliers.

4. Wagstaff Act

Legislation historically referred to as the "Wagstaff Act", Act approved May 18, 1931, 42d Leg., R.S., ch. 128, § 2 (amending article 7472 of the Texas Civil Statutes), was enacted by the legislature in 1931 and later codified as Section 11.028, Texas Water Code. . Its underlying purpose was based upon a perception that upstream municipal water suppliers were threatened by major downstream senior appropriation for hydroelectric and irrigation purposes. The Act declared that it was the public policy of the state that, in the allotment and appropriation of water and issuance of permits after 1931, preference and priority were to be given to listed uses in the order provided in the statute. Domestic and municipal uses were listed first, followed by industrial, irrigation, mining, hydroelectric power, navigation, and recreation, in that order. This preferential treatment based upon purpose of use was existing law and continues as law today with respect to issuance of permits, but the Act went on to provide:

> [a] . . . . provided, however that all appropriations or allotments of water hereafter made for . . . any other purposes than domestic or municipal purposes, shall be granted subject to the right of any city, town or municipality of this State to make further appropriations of said water thereafter without the necessity of condemnation or paying therefor . . . .

This provision was highly controversial for more than fifty years because it appeared to provide a mechanism for making water available for municipal use on a watercourse (except the Rio Grande) that was otherwise fully appropriated in permits issued after 1931. No Texas court ever

addressed this basic issue authoritatively. *But see City of San Antonio v. Texas Water Commission*, 407 S.W.2d 752, 764 (Tex. 1966). The uncertainties created by the Wagstaff Act were removed by the legislature in 1997 in Senate Bill 1, when it repealed Texas Water Code section 11.028, the successor provision.

5. Forfeiture and Cancellation of Water Rights

Another aspect of surface water law development that was not involved in the adjudication, but that has historical significance, concerns laws dealing with how water rights may be lost through abandonment or statutory forfeiture and cancellation. Since 1917, the legislature has provided means by which statutory water rights may be forfeited and canceled.

a. Forfeiture

The 1917 Act was the first statute to provide a means by which an appropriative water right could be terminated. *See* Act of Mar. 19, 1917, 35th Leg., R.S., ch. 88. (This provision was codified as article 7544 of the Texas Revised Civil Statutes and then as section 5.030 of the Texas Water Code. The current statute on forfeiture is found at Texas Water Code section 11.030.) Article 7544, *Vernon's Texas Civil Statutes* (1948), provided:

> Any appropriation or use of water heretofore made under any statute of this State, or hereafter made under the provisions of this Chapter, which shall be willfully abandoned during any three successive years, shall be forfeited and the water formerly so used or appropriated shall be again subject to appropriation for the purposes stated in this Act.

Article 7544 was applied as between the water rights holders in *City of Anson v. Arnett*, where the court held that there must be clear and satisfactory evidence of an intention to abandon a water right before it will be declared forfeited. *City of Anson*, 250 S.W.2d at 454. This is consistent with judicial disfavor of forfeiture of rights. According to the court, mere failure to repair a dam or facilities or the nonuse of water is not probative evidence of an intent to abandon a water right. *See also Lower Nueces River Water Supply District v. Cartwright*, 274 S.W.2d 199 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

An action of forfeiture of a water right under article 7544 applied to actions between water rights holders being heard by a court rather than to cancellation of water rights by an administrative agency. *Fairbanks v. Hidalgo County Water Improvement District No. 2*, 261 S.W. 542 (Tex. Civ. App.—Austin 1923, writ dism'd w.o.j.), held that article 7544 did not give the Board of Water Engineers the power to forfeit rights because to do so would violate article I, section 1, of the state constitution by giving judicial powers to an administrative agency. (This provision was originally enacted as part of the Irrigation Act of 1917 (Act of Mar. 19, 1917, 35th Leg., R.S., ch. 88), codified as article 7544 of the Texas Revised Civil Statutes, then as section 5.030 of the Texas Water Code. The current statute on forfeiture is found at Texas Water Code section 11.030.)

Although the 1917 Act and subsequent statutes did not give the Board of Water Engineers the authority to terminate an appropriative water right, the board did have the right to forfeit a permit, after notice, if the permitted work did not commence within ninety days, or as extended. Similar authority has been carried forward in Texas Water Code section 11.146, which establishes procedures, including a hearing, for forfeiture proceedings.

In the codification process in 1971, the forfeiture provision in article 7544 was repealed, leaving cancellation as the only statutory means through which an appropriative right may be terminated. *See* Act approved Apr. 12, 1971, 62d Leg., R.S., ch. 58, § 2. See Chapter 10 of this book for a discussion of current law on forfeiture of water rights.

b. Cancellation

The 1953 Act, which was enacted during the historic drought of the 1950s, established another means to terminate a water right through cancellation:

> All permits or certified filings for the appropriation and use of public waters granted by the Board of Water Engineers, or filed with said Board, more than ten (10) years prior to the effective date of this Act and under which no part of the water authorized to be withdrawn and appropriated has been put to beneficial use for a period of ten (10) consecutive years next preceding the effective date of this Act are hereby canceled and shall be of no further force and effect.
>
> Provided, however, that the Board shall send notice of such pending cancellation by registered mail, return receipt requested, to the holder of any such permit or certified filing, at the last address shown by the records of the Board of Water Engineers at least ninety (90) days prior to the effective date of such cancellation. The failure of the Board of Water Engineers to cancel a permit or certified filing hereunder shall not be construed as validating any such permit or certified filing not cancelled.

Act approved June 8, 1953, 53d Leg., R.S., ch. 352, § 1.

Cancellation of water rights pursuant to statute was upheld as constitutional in *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex. 1971). The court held that the

issuance of a permit authorizes the beneficial use of water and that a permittee does not acquire the right of nonuse of water. It is the duty of the appropriator to beneficially use the water. Water permits are grants of usufructuary rights to use the state's water, with the implied condition subsequent that the water is beneficially used. The cancellation statute provides a reasonable remedy for the state's enforcement of this condition subsequent after fair opportunity for notice and hearing. A permittee could reasonably have expected that his rights would be subjected to a remedy enforcing this condition, which inherently attached to the rights granted. The court concluded that the cancellation statute was not invalid even though it has retroactive effects. See Chapter 10 for a discussion of the current law on cancellation of water rights.

III. Legislative Water Management: Water Districts and River Authorities

As early as 1852, the legislature realized the need to manage surface water resources and to develop a system for individuals to acquire surface water rights. This effort began first in the arid portion of the state and was later extended to the entire state. The early efforts to develop water resources through private irrigation companies and privately financed projects proved less successful than was anticipated, and it was apparent that more legislation would be needed. The response was a constitutional amendment adopted on November 8, 1904. *See* Tex. Const. art. III, § 52 interp. cmt.

A. The 1904 Constitutional Amendment and Legislatively Created Irrigation Districts

The 1904 constitutional amendment authorized the legislature to establish political subdivisions and districts that could issue bonds for improvements of watercourses and for the construction and maintenance of works for irrigation, drainage, navigation, and roads. Tex. Const. art. III, § 52.

This amendment, enacted when there was public concern about higher taxes, contained limitations that hampered its effectiveness. For example, it required a two-thirds majority vote of resident property owners to authorize a bond issue, prevented taxation where cities were included within the boundaries of the district, and limited the amount of bonds issued by a district.

Based on the new authority granted in the 1904 constitutional amendment, the legislature passed a statute authorizing the creation of irrigation districts. *See* Act of Apr. 15, 1905, 29th Leg., R.S., ch. 235. The legislature also passed statutes providing for the creation of drainage and levee improvement districts. A few irrigation districts were formed pursuant to these new laws, and the statutes were declared constitutional. *See, e.g., Barstow v. Ward County Irrigation District No. 1*, 177 S.W. 563 (Tex. Civ. App.—El Paso 1915, writ ref'd); *White v. Fahring*, 212 S.W. 193 (Tex. Civ. App.—Galveston 1919, writ ref'd). However, the limitations imposed by the 1904 constitutional amendment restricted the irrigation development that it was intended to encourage. This continued until the legislature responded in the 1913, 1917, and 1918 Acts.

B. The Conservation Amendment

The 1913 Act, in addition to being a comprehensive water statute relating to surface water law, authorized the creation of "irrigation districts." Act approved Apr. 9, 1913, 33d Leg., R.S., ch. 172. Questions were raised about whether the legislature, under the 1904 amendment, had sufficient authority to create water districts with the powers necessary to fully develop the state's water resources. In 1917 the Legislation in the 1917 Act provided for the creation of water improvement districts. *See* Act approved Mar. 19, 1917, 35th Leg., R.S., ch. 87, and passed a joint resolution to submit to the voters of the state another and more liberal constitutional amendment with respect to, among other things, financing the operations and projects of water districts and river authorities.

The 1917 Conservation Amendment, approved by the state's electorate on August 21, 1917, authorized the legislature to establish water districts that have more operational and financial flexibility than those authorized under the earlier amendment. *See* Tex. Const. art. XVI, § 59(b). Specifically, it authorized the creation of conservation and reclamation districts and eliminated the financing restrictions and limitations contained in the 1904 amendment (article III, section 52). *See* Tex. Const. art. XVI, § 59 interp. cmt.; Hutchins, at 12.

C. Districts and Authorities after the Conservation Amendment

The Conservation Amendment was not self-enacting. By its terms, the legislature had the duty to implement the public policy expressed in the amendment. *See City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 802–03 (Tex. 1955). At a called session of the same 35th Texas Legislature, held in 1918, legislation was passed for the purpose of imple-

menting the Conservation Amendment. *See* Act approved Mar. 21, 1918, 35th Leg., 4th C.S., ch. 25. The 1918 Act, in addition to confirming provisions in the 1913 and 1917 Acts, provided for the creation of conservation and reclamation districts with the powers of water improvement districts. It also authorized existing water improvement districts and earlier irrigation districts to convert to conservation and reclamation districts that have the powers of such districts without having to change the district's name. Although the 1918 Act removed the limitations with regard to taxation, the process for converting to a conservation and reclamation district remained an impediment to development and use of the state's surface water. The process required a petition signed by a relatively large percentage of the owners of land in the district, confirmed by an election held in the district.

In *Trimmier v. Carlton*, 264 S.W. 253 (Tex. Civ. App.—Austin 1924), *aff'd*, 296 S.W. 1070 (Tex. 1927), the court discussed the background of these statutes and stated, without holding, that the 1917 Act dealing with water improvement districts was intended to supersede the 1913 Act because it covered the same general subject, and in many respects the two statutes were identical. However, the two statutes remained within statutory law. *See Trimmier*, 264 S.W. at 258. The court, on motion for rehearing, held that the Conservation Amendment did not supersede the 1904 amendment. To avoid the limitations imposed by the 1918 Act, special enabling legislation would be required to create a conservation and reclamation district. *Trimmier*, 264 S.W. at 262; *see also Arneson v. Shary*, 32 S.W.2d 907 (Tex. Civ. App.—San Antonio 1930, writ ref'd) (addressing the relationship between previous early irrigation canal companies and later created water districts).

Legislation passed in 1925 provided for the organization of water control and improvement districts, which were conservation and reclamation districts without the limitations cre-

ated by the 1918 Act as noted in *Trimmier*. Act of Feb. 26, 1925, 39th Leg., R.S., ch. 25 (which became Tex. Rev. Civ. Stat. art. 7880-1 *et seq.* (1954) and was later codified in Texas Water Code chapter 51). Because of the uncertainty caused by the *Trimmier* decision and the subsequent 1925 Act, numerous special bills were passed to validate existing districts, convert existing districts into conservation and reclamation districts, and create new districts. *See* Tex. Rev. Civ. Stat. art. 8280-2 *et seq.* (1954), Water Auxiliary Laws (Vernon 2004–05). The legislature is in the process of codifying these special enabling statutes. *See generally* Tex. Spec. Dist. Local Laws Code.

The 1925 legislature authorized the conversion of any existing water improvement district or irrigation district into a water control and improvement district by action of its board of directors. *See* Tex. Water Code §§ 51.040–.044 (relating to water control and improvement districts). The authority to convert to a water control and improvement district was extended in 1929 to levy improvement districts or any other existing conservation and reclamation districts. *See* Tex. Rev. Civ. Stat. arts. 7880-143, 7880-143a (1954) (now included in Tex. Water Code ch. 51). Although the 1925 Act, Act of Feb. 26, 1925, 39th Leg., R.S., ch. 25, § 144, later Tex. Rev. Civ. Stat. art. 7880-144 (1954), appeared to validate that all existing water improvement districts and irrigation districts were operating under the Conservation Amendment, this issue remained uncertain with regard to existing and possible future districts and river authorities in their efforts to manage water sources within their respective jurisdictional boundaries.

The legislature also provided for other special-purpose districts, such as fresh water supply districts, Act approved July 28, 1919, 36th Leg., 2d C.S., ch. 48; municipal utility districts, Act approved Apr. 27, 1971, 62d Leg., R.S., ch. 84; and drainage districts, Act approved Mar. 23, 1907, 30th Leg., R.S., ch. 40; Act approved Mar. 28, 1911, 32d Leg., R.S., ch.

118. Many other types of districts and river authorities were created in specific watersheds—for example, the Brazos River Authority, Act of July 2, 1929, 41st Leg., 2d C.S., ch.13, 1929 Tex. Spec. Laws 22; the Guadalupe-Blanco River Authority, Act approved Oct. 25, 1933, 42d Leg., 1st C.S., ch. 75, 1933 Tex. Spec. Laws 198; and the Lower Colorado River Authority, Act approved Nov. 13, 1934, 43d Leg., 4th C.S., ch. 7, 1934 Tex. Spec. Laws 19. See Chapter 7 of this book for a discussion of water districts and Chapter 8 regarding river authorities and regional water districts.

In 1971, the legislature codified almost all water law and water district statutes. In general, it was intended that the Texas Water Code should include all general water laws of the state as well as amendments made to such laws. However, many of the general water district laws were not codified. *See* Water Auxiliary Laws (Vernon 2004–05). Most of the provisions of the 1917, 1918, and 1925 Acts were codified, including those dealing with water improvement districts, water control and improvement districts, fresh water supply districts, and drainage districts. For example, the 1925 Act providing for water control and improvement districts is now found in Texas Water Code chapter 51, and the statutes dealing with water improvement districts, which govern early irrigation districts under the 1905 statute, are found in chapter 55. See Chapter 7 of this book.

Significantly, in 1971 the question of the status of irrigation districts organized under the early laws pursuant to the 1904 constitutional amendment was resolved with adoption of Texas Water Code section 55.050. Under this provision, those early irrigation districts are governed by the provisions of chapter 55 and are allowed to change their name if they desire. *See* Tex. Water Code §§ 55.050–.051. This is consistent with *dicta* in *Trimmier*. *See Trimmier*, 264 S.W. at 258.

In 1977, the legislature approved legislation establishing a new type of district called an *irrigation district* as a district separate and apart from other existing earlier water districts and irrigation water districts. Act approved June 15, 1977, 65th Leg., R.S., ch. 627. This legislation was added as chapter 58 of the Texas Water Code. A chapter 58 irrigation district is a conservation and reclamation district pursuant to the Conservation Amendment, article XVI, section 59, of the Texas Constitution. The specific purposes of these new irrigation districts are to deliver water for irrigation, provide for drainage, and deliver untreated water to municipal suppliers. They are authorized to perform, in addition to the delivery of irrigation water, other incidental functions and may contract with municipalities, political subdivisions, water supply corporations, or other water users for the delivery of untreated water. *See* Tex. Water Code §§ 58.121–.190. See also Chapter 7.

As mentioned above, the 1925 Act authorized all existing water districts to convert to water control and improvement districts with the additional powers authorized by the Act. Similarly, chapter 58 authorizes any water improvement district (including an earlier created irrigation district operating as a water improvement district) or water control and improvement district, whose purposes were to furnish water for irrigation and delivery of untreated water, to convert to a chapter 58 irrigation district. *See* Tex. Water Code §§ 58.038–.042.

In 1995, uniform provisions dealing with water districts were enacted in chapter 49 of the Texas Water Code. They apply to all districts, with certain exceptions for "special water authorities." Act approved June 15, 1995, 74th Leg., R.S., ch. 715 (codified at Texas Water Code chapter 49). According to the legislature, this step was needed because of the "lack of procedural uniformity between the different types of local water district[s]" and "inconsistencies [that] lead to confusion among citizens, district board members, and state agency per-

sonnel." Bill Analysis, Senate Bill 626, House Natural Resources Committee, 74th Leg. (1995). For a review of some water district organizational and operational issues, see *Ward County Irrigation District No. 1 v. Red Bluff Water Power Control District*, 170 S.W.3d 696 (Tex. App.—El Paso 2005, no pet.).

As discussed in greater detail in Chapters 7 and 8 of this book, with legal issues involving water districts and authorities, it is necessary to consider the noncodified special and general laws authorizing and governing a district or, if codified, the chapter of the Texas Water Code covering the particular district, as well as chapter 49, which applies to all surface water districts.

IV. Conclusion

Surface water law in Texas has evolved from a dual system of common-law riparian rights and appropriation rights granted by the state to a more uniform system based on the appropriation doctrine controlled by the constitution and legislation passed pursuant to the constitution. Within this transformation is the recognition that a perfected water right is a property right to use the state's water, which is protected by the constitution. The legislature has provided for management of its water resources through local and regional water districts and river authorities, watermaster programs, and the regulatory system within the current Texas Commission on Environmental Quality, which governs the enforcement of water rights and the granting of permits and amendments to existing water rights.

The surface water law system, as it has evolved, is not yet a perfect system. There are many legal issues and refinements yet to be considered and dealt with by the legislature, by

the judiciary, and when necessary, in amendments to the Texas Constitution. The current surface water law system has matured through this evolution and is one that can be built upon to meet the state's future water resource needs.