HISTORICAL DEVELOPMENT OF TEXAS SURFACE WATER LAW: BACKGROUND OF THE APPROPRIATION AND PERMITTING SYSTEM

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I. INTRODUCTION and OVERVIEW

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

Substantial modifications in Texas surface water laws have occurred from time to time to a much greater extent than in other aspects of property law. For this reason, one can best understand the Texas law of surface water rights today 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, and the politics at a point in time motivated by social and historical events, and economic considerations, which are all often driven by nature. Droughts and water shortage, as well as floods, often have been followed by changes in water law. This paper 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 reserve the water law of New Spain. *Law of January 20, 1840*, §§ 1-2, Tex.Gen.Laws 3, 2 H. GAMMEL, LAWS OF TEXAS, 177, 178 (1898). When it became a State in 1845, Texas reserved the ownership of its public land, water, and other natural resources. *Ordinance, passed at Convention of Delegations for framing a Constitution for the State of Texas* July 4, 1045, Journals of the Convention, pp. 8-10, July 4, 1845. 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. After the adoption of the common law in 1840, the courts adopted a version of the common law riparian rights system some 16 years later. *Haas v. Choussard*, 17 Tex. 588 at 589 (1856), *see, also,* Tarlock, *Law of Water Rights and Resources*, Chap. 3 (1988). 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*, pgs 1-3 (1961). The Legislature during these unstable times, faced with public pressure to develop the State's water resources, passed legislation encouraging local private irrigation projects. *See*, Irrigation Act of 1852, 3 LAWS OF TEXAS, 958 (1898). 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

survival of governmental stability, rather than on regulation of the state's water resources. Later, when people were free to pursue a better life and economic stability, the need for certainty in 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. 1889 Tex.Gen.Laws, ch. 88, at 100, 9 H.GAMMEL LAWS OF TEXAS, 1128 (1889).

In an effort to improve the 1889 Act, the Legislature passed 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. . 1895 Tex.Gen.Laws, ch. 21, at 21, 10 H. GAMMEL LAWS OF TEXAS, 751 (1889). This legislative policy of State control of the water resources, which also recognized private property rights, was reinforced by legislation passed in 1913 and 1917-1918. The dual system of 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 enactment of the Water Rights Adjudication Act in 1967. *See, In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 439 (Tex. 1982) (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 Act, both those claimed under common law and under 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 struggle with such issues as re-use, environmental flows, and interbasin transfers in an effort to meet the changing and increasing needs for water in a state with a growing population and which is changing from a predominately agrarian society to a commercial and industrial society.

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 term the community authority and the mayor, under authority granted by the King. *See*, *San Juan Ditch Company v. Cassin*, 141 S.W. 815 (Tex.Civ.App. - 1911, err.

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, Dobkins, Betty Eakle, "The Spanish Element in Texas Water Law*" (University of Texas Press, 1959), at pp. 103-113.

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, Wells. A. "The Texas Law of Water Rights,"* pp. 102-103 (1961).

Under Spanish and Mexican law, surface water was reserved to the King or the government (the public) which governed its use, with the exception that those 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, *i.e.*, 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*, Badde, *The Historical Background of Texas Water Law - a Tribute to Jack Pope*, 10 St. Mary's L.J. 1 (1986).

Early water law court decisions, *e.g, Haas v. Choussard*, 17 Tex. 588 (1856, and later *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926), misunderstood these legal concepts and were later reconsidered and overturned. Later courts clarified this historical influence and relied upon it to support their decisions. See, *e.g. State of Texas et al. v. Valmont*, 346 S.W.2d 853 (San Antonio, 1961) discussed below.

B. Republic of Texas Period

During the period 1836-1840, the Republic of Texas was governed by Spanish and Mexican civil law. Statutes in force during this period are construed in light of Mexican civil law. The validity and legal effect of contracts and grants of land are determined according the civil law in effect at the time of the contract or grant. *Miller v. Letzerich*, 121 Tex. 248, 253-254, 49 S.W.2d 404 (1932). In 1840, the Republic adopted the English common law. At that time, embedded in English common law, was a riparian right to use surface water. *Law of January 20, 2840*, I1-2, Tex.Gen.Laws 3, 2 H. GAMMEL, LAWS OF TEXAS, 177, 178 (1898). During this period of the Republic, 1836-1845, except for adoption of the English 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, it retained its public land and resources and debt, *Joint Resolution for Annexing Texas to the United States*, 28 Congress, Session II, Resolution No. 8, March 1, 1845; and Ordinance, passed at Convention of Delegates for framing a Constitution for the State of Texas, July 4, 1845, Journals of the Convention, pp. 8-10, July 4,

1845. 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 the other states.

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 was vital to the State's economy and growth at the time. The 1852 Act authorized counties to regulate dams and distribute shares of the water. 1852 Tex.Gen.Laws, ch. 74, at 80, 3 H. GAMMEL, LAWS OF TEXAS, 958 (1898). Counties were given authority to regulate the construction, operation and maintenance of irrigation works, authority apparently intended to replace the former regulatory power of the community "alcalde" system of Spanish and Mexican law consistent with "... the principles of the Mexican laws," *Tolle v. Correth*, 31 Tex. 362, 364-365 (1868). It was observed that the 1852 Act was consistent with "ancient law" that regulated community irrigation. *Davenport, "Development of the Texas Laws of Waters,"* 21 Vernon's Tex.Civ.Stat.Ann. (1953). The 1852 Act remained the law in Texas until its repeal by the so-called "Water Appropriation Statute of 1913," (*Hutchins* 104-105).

2. Riparian Rights

After the adoption of the common law of England in 1840, there was imbedded 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. Tarlock, *Law of Water Rights and Resources*, Chap. 3 (1988). However, it was not until 12 years later, after the Legislature's first attempt to manage use of surface water by the Irrigation Act of 1852, that the courts applied English common law to Texas water law. In 1856, the Texas Supreme Court held in *Haas v. Choussard*, 17 Tex. 588 at 589 (1856) 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." *See, generally, Hilderbrandt, "The Rights of Riparian Owners at Common Law in Texas,"* 6 Tex.Law Rev. 19 (1927). The recognition of this right was significant, especially for irrigation in the semi-arid regions of Texas. *Tolle v. Correth*, 31 Tex. 362, 364-65 (1868); *Rhodes v. White head*, 27 Tex. 304, 310-311, 315-16 (1863).

In *Fleming v. Davis*, 37 Tex. 173, 201, 202 (1872), for example, the applicability of riparian water rights to semi-arid 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 Texas Supreme 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 applied in Texas. 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 *Laws of Texas,* 151 (Gammel 1854), 400, 580, 823, (Gammel 1856), 1202, 1294 (Gammel 1858); 5 *Laws of Texas* 536 (Gammel 1861), 789, 793, 794 (Gammel 1864), 1318, 1431, 1572, 1584, 1605, 1607 (Gammel 1866); 6 *Laws of Texas* 712 (Gammel 1870); 7 *Laws of Texas* 191 (Gammel 1871). During this same period, at least 14 of these laws granted the right to divert water from various streams for irrigation and other purposes. S*ee*, *e.g.*, 4 *Laws of Texas* 1314 (Gammel 1858); 5 *Laws of Texas* 231, 302 (Gammel 1860), 570 (Gammel 1862), 1284 1360, 1491, 1627 (Gammel 1866); 6 *Laws of Texas* 683 (Gammel 1870), 1470, 1621 (Gammel 1871); 7 *Laws of Texas* 316 (Gammel 1871), 1310 (Gammel 1873); 9 *Laws of Texas* 14 (Gammel 1879). 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*, proceedings, Water Law Conference, University of Texas 41, 47 (1959).

The same was true with respect to grants to individuals. For example, in 1862 the Legislature authorized John C. Crawford ". . . to take from the Leona river, in or near the vicinity of the Montezuma Mills, in the county of Uvalde, so much water as he may need for the purpose of irrigation, and the same to conduct by any necessary ditch or ditches to such lands as he may wish to cultivate, and to make and construct such dam or dams in and across said river and such ditches, water-gates and other works as may be necessary for such purposes of irrigation."

He was also granted rights of way and power to condemn rights of way for necessary ". . . dams, ditches, water-gates and other works from and including the point where it may be necessary to take the water from said river to the point or points where the said ditch or ditches may terminate." *Laws of the State of Texas,* Ch. CVII, "*An Act to authorize John C. Crawford to use the water of the Leona river for purposes of irrigation*."

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 (1/4th) of all the water forming said river, and apply the same to the purposes of irrigation . . .". *Laws of the State of Texas,* Ch. CLVII, "*An Act to Incorporate the El Paso Irrigation and Manufacturing Co.*", approved November 6, 1866. The needs of the time dictated the development of a strong agricultural economy to encourage migration and produce food for the State's growth.

A law enacted December 20, 1861, authorized 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 prior 1852 Act. 5 *Laws of Texas* 452 (Gammel 1861). Water policy at that time recognized the importance of encouraging irrigation development and that the State had to play a role in the development of its natural water resources.

Texas statutes relating to private corporations, however, developed more rapidly than the statutes defining the right to the water itself and 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. 7 Laws of Texas 68, (GAMMEL 1871). Section 58 of the Private Corporation Act of April 23, 1871, (GAMMELS LAWS VIII - 136) 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." The following 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 water on lands to the detriment of the owners without their consent, or due payment to the parties aggrieved." (Emphasis added). Ch. 63, General Laws of 1875, p. 77, approved March 10, 1875, J. GAMMEL, LAWS OF TEXAS VIII - 449). 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. *Mud Creek Irrigation Agricultural and Manufacturing Co. v. Vivian*, 74 Tex. 173, 11 S.W. 1078 (1889) discussed below.

These early irrigation laws were not water rights statutes as such, but were related to public regulation of the affairs 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 recognized 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*, 74 Tex. 173, 11 S.W. 1078 (1889). 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." (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 the statute only applied 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 an example of the dilemma that existed for individuals desiring to develop their water rights. Companies, such as the plaintiff, 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 until to 1888. *See*, Stahle, D.W., and M. K. Cleaveland, 1988: *Texas Drought History Reconstructed and Analyzed from 1698 to 1980*. *J. Climate*, 1, 59-74, at pages 66, 72; Helms, D., *Great Plains Conservation Program, 1956-1981: A Short Administrative and Legislative History*, reprinted from *Great Plains Conservation Program: 25 Years of Accomplishment*, SCS National Bulletin Number 300-2-7, November 24, 1981;
http://www.nrcs.usda.gov/about/history/articles/GreatPlainsConservPrgm.html, at p.1.

Responding to these 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 Irrigation Act of 1889, 1889 Tex.Gen.Laws, ch. 88 at 100, 9 H. GAMMEL LAWS OF TEXAS, 1128 (1889) was entitled "An Act 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 Stock Raising in the Arid Districts of Texas."

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." (Emphasis added).

The Act made clear that the unappropriated waters within the *arid portions* of the State were 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 canals or ditches was to be located.

This statute was primarily for the protection of irrigation ditch companies and its key purpose was to authorize these companies to appropriate water, urging that irrigation canals should be built "at once." Id., §§ 1, 2, 5, and 17, 1889 Tex. Gen Laws at pages 100-103. 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 an historic perspective, it is interesting to note what would have occurred in later years with respect to groundwater law if the Legislature and courts would have expanded on this intent to include groundwater within the appropriation doctrine.

Only the riparian right aspects of the Act were interpreted by the courts. The Supreme Court of Texas, in *McGhee Irrigation Ditch Co. v. Hudson,* 85 Tex. 587, 22 S.W. 398 (1893), without referring to Section 1 of the Act which protected only riparian domestic use, held:

> Section 2 of the act can not 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. . . (and that). . . 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, citing 1 Wash., 4; 2 Wash., 367; 2 Black., 18; *Carey v. Daniels*, 8 Metc. 480; *Lux v. Haggin,* 69 Cal. 255; *Scriven v. Smith*, 100 N.Y., 480. (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, 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 of the Twenty-Third Legislature (Ch. 44, p. 47, General Laws of 1893, approved March 29, 1893; H. GAMMEL, LAWS OF TEXAS X, 477). The 1889 Act was 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, 1895 Tex.Gen.Laws, ch. 21 at 21, 10 H. GAMMEL, LAWS OF TEXAS, 751 (1898). This law sought to reserve to the State storm or rain waters, 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 unappropriated 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 watershed 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 owners without his consent, except after condemnation thereof in the manner as hereinafter provided*. (Emphasis added).
>
> 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."
The 1895 Act not only encouraged irrigation, it also addressed water for mining, milling, and stock-raising uses and waterworks for cities and towns. It established the method by which irrigation developers 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 in the State, including ordinary flows, storm water and floodwater 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.

The 1895 Act's limits on the rate-making power of irrigation companies previewed existing law with respect to regulation of rates charged by some entities for the supply or delivery of potable or non-potable water.

In summary, the 1895Act was primarily directed toward irrigation use of water and 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 some security and certainty of a recognized legal right to use water from a stream as incentive to encourage investment in agricultural and water projects. It attempted to provide for better management of the water resource. The essential element of the appropriation doctrine system, "first in time is the first in right," *i.e.*, the priority system, was made clear and provided some means of enforcement of water rights. Nonetheless, it left much uncertainty with respect to the nature of the "riparian right" and how it was to be reconciled with the appropriation doctrine of water rights.

During the period 1895 to 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 in the State. *See*, Herbert Davenport, "*Development of Texas Laws of Water*," Vernon's Ann. Civ. Stat., page XXIII (1954). However, water rights claimants still had an incomplete system of water laws to ensure their claims were honored.

(c) The Dual System and Conflicts in the Courts

During this period water right holders had to rely upon the courts to resolve their disputes. This was a very awkward process. It required injunction lawsuits, so that a court could exercise its equitable powers in attempting to resolve conflicts. A court could only resolve disputes between individual parties in the litigation without taking into account the impact of such litigation on other water right holders on a stream, or segment of a stream. The process also

placed the courts in the difficult position of deciding technical hydrologic and water management questions without the aid of relevant hydrologic evidence.

An example of these difficulties was an early water dispute after the 1889 and 1895 Acts, and before the 1913 Act. In *Biggs v. Miller*, 147 S.W. 632 (Tex.Civ.App. - - El Paso 1912) 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.

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

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

Because the suit was for an injunction, an equitable remedy could be applied. The trial court divided the flows in a detailed, practical manner distinguishing between appropriative rights to non-riparian lands and riparian rights to riparian lands, recognizing and consistent with the dual system of water rights. The court recognized the appropriative rights under 1895 Act, and riparian rights as to riparian lands, by declaring: "By our statutes, the 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." 147 S.W. 632 at 637. The court disagreed with some of the equitable findings of the trial court and found procedural errors, and reversed the case for further proceedings. No resolution was achieved, and no further judicial history is available on the case.

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

> The appellate court, on motion for rehearing, provided guidance to the District court: It is certain that under our laws the waters are the property of the public, subject to the easements of riparian owners. The riparian easement is the right to use an

amount of water reasonably sufficient for domestic and stock-raising purposes and for irrigating the riparian lands. A statutory appropriation, under our decisions, is effective as against the waters so the property of the public, subject to the easements of the riparian owners which have the prior right.

If the water is sufficient only for riparian owners using it, it must be equitably divided between them. As between the riparian owners and the statutory appropriator, the riparian owners must first have water reasonably sufficient, as indicated; but as against the excess the statutory appropriation is effective. To hold that riparian owners have the right to have all the water flow past their land as against statutory appropriations would be to destroy the appropriation statute in its entirety, for there are riparian owners on every stream, and if each had the right as against the appropriator 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.

These cases illustrate the many complex issues arising (a) in interpreting and enforcing individual water rights claimants claiming both appropriative and riparian rights; (b) against a

number of parties in a single litigation without joinder of all water rights claimants on the stream or segment of a stream; and (c) without the benefit of technical definition of rates of flow, system capacities, and other relevant hydrologic evidence. They also illustrate the frustration exhibited by the courts in reconciling the dual system of law at the time. *See, also,* for later litigation on the *Pecos, Ward County Water Improvement District No. 2 v. Ward County Irrigation District No. 1, et. al.*, 214 S.W. 490 (Tex.Civ.App. - - El Paso 1919); *Hoefs v.* Short, 114 Tex. 501, 510, 278 S.W. 785 (Tex.Sup.Ct. 1925); Ward *County Water Improvement District No. 3, et. al. v. Ward County Irrigation District No. 1, et. al.*, 237 S.W. 584 (Tex.Civ.App. - - El Paso 1922, writ granted, ref'd and aff'd, 117 Tex. 10, 295 S.W. 917 (Tex. 1927); *William v. Reeves County Water Improvement Dist. No. 1*, 256 S.W. 346 (Tex.Civ.App.-- El Paso, 1923). The relative rights on the Pecos were never fully resolved until later adjudication under the Water Rights Adjudication Act of 1967. [*See*, II D 1]. *See, also, Borden v. Trespalacios Rice & Irr. Co.*, 86 S.W. 86 (Tex.Sup.Ct. 1905); *City of Wichita Falls v. Bruner*, 191 S.W.2d 912 (Tex.Civ.App.-- Ft. Worth, 1945); King, Neal, *"Inadequacies of Existing Texas Procedure for Determination of Water Rights on Major Stream Segments,* Proc. Water Law Conference, Univ. of Texas, pgs 66-73 (1956).

Historically, the privately operated and financed irrigation companies who 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 development did not develop as expected after the 1895 Act. At the same time the "filing" system provided in 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 and floods, and the need to develop agriculture and other uses, brought about conditions for change.

The common law riparian rights were yet to be defined and the appropriation declarations filed with the county clerks only required that the amount of water to be appropriated and the area to be irrigated be stated generally as to appropriation statutory rights. This left many details of an appropriative statutory "water right" such as the specific location of use, purpose, rates and location of diversion points, and other details open to conjecture. The system lacked a manageable definition of riparian rights adding to the uncertainty. This process did not lend itself to a system by which all water rights in the State could be inventoried and managed. *See,* Rollins, *The Need for a Water Inventory in Texas*, Water Law University of Texas, 67, 68 (1952).

These circumstances first led to a Constitutional Amendment in 1904 providing for establishment of water districts. These would be political subdivisions of the State with the means to provide money necessary for operational and facility development 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 1910-1913 period. The Legislature made basic changes to surface water law in 1913.

(d) The Irrigation Act of 1913

The Irrigation Act of 1913, which followed droughts in 1910 through 1913, was known as the Glasscock Act, referring to its sponsor, Rep. D. W. Glasscock. The Act sought to improve the water rights system. Irrigation Act of April 9, 1913, Ch. 171, p. 358, 1913 Tex.Gen.Laws. 358, 379. S*ee* Helms, D., *Great Plains Conservation Program, 1956-1981: A Short Administrative and Legislative History*, reprinted from *Great Plains Conservation Program: 25 Years of Accomplishment*, SCS National Bulletin Number 300-2-7, November 24, 1981; http://www.nrcs.usda.gov/about/history/ articles/GreatPlainsConservPrgm.html, at p.1, and flood in 1913. This comprehensive legislation created the Board of Water Engineers and centralized the statutory water rights inventory process by providing that waters belonging to the State could only be appropriated pursuant to permits issued by that Board through procedures provided in the Act. While acknowledging the common law riparian rights, it did not address their nature and extent.

The 1913 Act repealed earlier water laws, primarily applicable to the arid regions of Texas, and adopted a uniform system of statutory water laws for the entire State. In essence, the 1913 Act declared waters within Texas to be the property of the State, and provided the means and process by which water could be appropriated for designated purposes including ". . . water works for cities and towns . . .". (Sections 2 and 4). *See, Texas Water Rights Commission, et. al. v. City of Dallas*, 591 S.W.2d 609 at 613 (Tex.Civ.App. - - Dallas, 1979).

The Act established an administrative agency, the Board of Water Engineers, to manage the water rights system. The Board 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 of Water Engineers. 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 steam. Some forty years later, these rights were defined as "certified filings." Acts 1953, 53rd Leg. Section 2, p. 867, ch. 352.

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 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 prior to 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, and 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:

> [W]hile 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 use the water; from the Primary use for drinking and domestic purposes, the supply of cities and towns, the natural use for stock raising, the use 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.

House Journal, 1913, pages 949-950. *See*, *Texas Water Rights Commission, et. al. v. City of Dallas*, 591 S.W.2d 609 at 613 (Tex.Civ.App. - - Dallas, 1979).

At the time, 90% 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. *Herbert Davenport, "Development of Texas Laws of Water,"* Vernon's Ann. Civ. Stat. 1 (1954). It was not long before these issues were addressed by another constitutional amendment and further legislation.

(e) The Irrigation Act of 1917

A drought in 1917 increased water needs and public pressure to develop the water resources of the State, culminating in the repeal of the Irrigation Act of 1913 by the 1917 Irrigation Act, Ch. 171, Tex.Gen.Laws 358, Act 35th Leg. c. 88. The 1917 Act included most of the substance of the 1913 Act. It also clarified the permitting process. However, more significantly the Act added provisions for adjudication of water rights. Some contemporaries of the 1917 Act, believed it destroyed the intent of 1913 Act, which protected riparian right claimants. S*ee*, *Davenport*, *supra*. 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. Acts 1917, 35th Leg. p. 500, S.J.R. No. 12.

(f) Conservation Amendment - 1917

On August 21, 1917, the "Conservation Amendment" was approved. Vernon's Ann.Tex.Const.Art. XVI § 59. It enabled the Legislature to create governmental entities whose purpose was to "conserve" water by "developing" the water resources in the State. The term "conservation" at that time 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 over-flowed 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. 16, § 59(a). (Emphasis added for later reference, the Amendment was intended to attach to all resources, including oil and gas). The governmental entities to be created were conservation and reclamation districts. They had such powers concerning the subject matter of the Amendment as conferred by law. Tex. Const. art. 16, § 59(b).

The Conservation Amendment is important in many respects. First, it declared that all water resources in the State 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 resource. It also 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 upon the Legislature to execute the public policy expressed in these provisions. *Corpus Christi v. Pleasanton*, 154 Tex. 289, 295-296, 276 S.W.2d 298 (1955). The Legislature promptly acted to legally confirm the 1917 Act and its provisions.

(g) 1918 Act

In 1918, after passage of the Conservation Amendment, the Legislature amended the Act of 1917, 1917 Act, §§ 102-132, of March 19, 1917, to confirm and clarify, among other things, the extent of the power of the Board of Water Engineers to issue permits, to adjudicated existing water rights, and its authority pertaining to water rates charged by suppliers for the use of water. This Act is sometimes referred to as 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 *Board of Water Engineers v. McKnight*, 111 Tex. 81, 229 S.W. 301 (1921). This was a significant decision for several reasons, but for two reasons in particular. On the positive side, it recognized that a vested water right is a property right. On the negative side, it delayed 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).

(h) 1925 Act

In 1925, because of the *McKnight decision*, water legislation was passed that omitted the adjudication provisions of the 1917-1918 Acts and thereby repealed the adjudication provisions. Tex.Rev.Civ.Stat. 1925, Title 2. This legislature also changed the domestic and livestock reservoir exemption.

(i) The Dual System and Conflicts in the Courts Continued

In 1926, the Texas Supreme Court in *Motl, et. al. v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926) analyzed, in depth, the development of water law in Texas up to that time. Simply stated, this case was brought by a riparian claimant to irrigation rights seeking to pump water from a small reservoir built and developed by an appropriator under a filing made under the 1889 Act. The riparian claimant's application for a permit was denied by the Board of Water Engineers; but, the riparian continued to pump water from the reservoir. The reservoir owner sued seeking to enjoin the riparian from diverting water. Although this case was later reversed on other grounds dealing with the nature of the riparian right, it is still an instructive case with respect to the 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 only extended to domestic stock and household uses and rights for other uses had to be obtained by statutory appropriation. The Court was urged to declare that riparian rights do not exist on natural or statutory navigable streams. Thus, the 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." 286 S.W. 458 at 467, citing *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733; *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301; *Martin v. Burr*, 111 Tex. 228 S.W. 543.

Having held that a riparian right to irrigation existed, the Court recognized that a riparian right only attached to the ordinary and normal flow of a stream, not to flood waters. The Court felt compelled to legally define the water to which a riparian is entitled. The Court's opinion was " . . . that riparian waters are the waters of the ordinary flow and underflow of the stream, and that the waters of the stream, when they rise above the line of the highest ordinary flow, are to be regarded as flood waters or waters to which riparian rights do not attached. . . .. The line of highest ordinary flow is the highest line of flow which the stream reached and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal, and usual condition, uninfluenced by recent rainfall or surface run-off." 286 S.W. 286, at 468-469. In applying this legal definition of flows, the Court affirmed a judgment enjoining the riparian from pumping from a reservoir, *except when water was running over the appropriator's dam*. This result, from a practical standpoint, (1) allowed the appropriator to take as much water

as desired, whether the water was "ordinary" or "flood" flow; (2) only allowed the riparian to pump water when the reservoir was full and overflowing; and (3) regardless of the amount of "ordinary" flow in the stream available to the riparian at a particular point in time, it could not be taken if the water is needed to fill the reservoir, even if the appropriator is pumping at the same time. Needless to say, this practical result created confusion as other courts tried to apply the holding as precedent.

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 an flood flow," normally a matter of hydrology and science rather than law, caused much uncertainty. Although 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 storm and floodwaters for later use, but as a practical matter also captured ordinary flows and "conserve water."

The Motl court made another significant, although often overlooked holding. In spite of the earlier similar attack on the adjudication provisions in the 1917-1918 Acts in the *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301, involving the separation of powers doctrine, the *Motl* Court concluded that the provisions providing for the issuance of permits to appropriate waters were valid and constitutional. 116 Tex. 82, at 124-127, 286 S.W. 458 at 474-475.

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

The court noted that the Plaintiff's permit only authorized it to impound public waters of the State consisting of storm and flood waters of the Navasota River, and expressly prohibited it from impounding any part of the normal flow of the Navasota River. The Plaintiffs also constructed other dam(s) which backed-up water onto the land of other riparian owners. The court, relying on cases recognizing riparian rights, trespass laws, and statutory appropriation rights, and a very complicated set of facts, determined that the injunction to prohibit the diversion of waters from the water in the flood pool would be a continuous legal wrong and trespass without just compensation, and therefore denied the injunction. This case illustrates the complicated nature of the construction of dam(s) by an appropriator faced with riparian water

rights claims and how a court sitting in equity must determine the appropriate result. The case, in essence, denied the rights of the appropriator while recognizing assertable claims by riparian(s), but the result did not provide guidance to water right holders in the state.

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

D. Riparian Rights Revisited and Court Adjudication

1. *State, et. al. v. Valmont*

The Court's decision in *Motl v. Boyd* recognizing the common law riparian right to irrigation remained the law in Texas until 1962. It was followed by many courts and undoubtedly many business decisions were made relying upon it. As noted by Chief Justice Murray in his dissent in *State of Texas, et. al. v. Valmont*, 346 S.W.2d 853 (San Antonio 1961), the Court's decision in *Motl v. Boyd*, had been cited 78 times by Texas courts since 1926 and that " . . . 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." 346 S.W.2d 853 at page 883. Nonetheless, the Texas Supreme Court in 1962 having the issue squarely raised of the existence of a common law riparian right to irrigation under Spanish and Mexican law, having considerably more evidence and information regarding Spanish and Mexican law than available to the 1926 court, determined the law differently.

In a thoroughly considered and exhaustive study of Spanish and Mexican law, the 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) the prior Spanish and Mexican 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 853, at 881-882. *Valmont* was a case between appropriators and common law riparian right claimants on the Rio Grande, having been severed as a separate cause arising out of the *Valley Water Case, The State of Texas, et al. v. Hidalgo County Water Control and Improvement District No. 18, et al.*, 443 S.W.2d 728 (err. ref'd. n.r.e.).

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, et. al. v. Hidalgo County Water Control and Improvement District No. 18, et. al.*

Another important case from which the *Valmont* case arose is *State of Texas, et. al. v. Hidalgo County Water Control and Improvement District No. 18, et. al.*, 443 S.W.2d 728 (Tex.Civ.App. - - Corpus Christi March 27, 1969, writ ref'd n.r.e., December 9, 1970), often referred to as the "*Valley Water case*." The *Valley Water case* emphasized the need for more efficient water rights adjudication. This case was an injunction case, similar to earlier cases seeking clarification of water rights. Therefore, the court was able to equitably adjust the results of the case. This was 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 over 30 years to decide. It involved roughly 3,000 parties, all potentially adverse to one another other, and cost an estimated ten million dollars ($10,000,000.00) in court costs and attorney fees. *Texas Water Rights Commission: Allocating a Limited Natural Resource for Competing Uses*, 47 Tex. L. Rev. 804, 875 (1969). The parties were seeking a right to a limited supply of water, and after years of litigation between individual parties claiming individual claims to water rights adverse to all other party claimants, the State filed an injunction action against all of the water rights claimants to adjudicate all water rights in the river segment below and including Falcon Reservoir, S*ee, also, Hidalgo and Cameron Counties W.C.I.D. 9 v. Starley*, 373 S.W.2d 731 (Tex.Sup.Ct. 1964); *Hidalgo County W.I.D. No. 2 v. Cameron County W.C.I.D. No. 5*, 253 S.W.2d 294 (Tex.Civ.App. -- San Antonio, 1952); *Maverick County Co. C.I.D. No. 1 v. City of Laredo*, 346 S.W.2d 886 (Tex.Civ.App.-- San Antonio, 1961); *Hidalgo County W.I.D. No. 2 v. Blalock*, 301 S.W.2d 593 (Tex.Sup.Ct. 1957).

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 riparian water right claims were severed from the suit and tried separately in the *Valmont Plantations* case discussed above. After resolution of the case in *Valmont*, 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 later category included riparians and others who had been using water in the good faith mistaken belief that they had riparian rights. The court justified its rejection of time priorities by, *inter alia*, observing that the existing appropriative rights in the Lower Rio Grande were to divert from a free flowing stream. 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 State's 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 stressed the need for a constitutional administrative adjudication process without which it would be extremely difficult, or almost impossible to quantify and adjudicate all the water rights on all of the streams in the State. *See, Smith, the Valley Water Suit* and its impact on Texas Water Policy: *Some Practical Advice for the Future*, 8 Tex. Tech. L. Rev. 577 (1977); Johnson, *Adjudication of Water Rights*, 42 Tex. L. Rev. 121 (1963). This experience, coupled with earlier difficulty in the court cases dealing with disputes between water right claimants and the need to quantify and define existing water rights in the state, led to the passage of a 1967 Adjudication Act.

E. Water Rights Adjudication Act of 1967

1. Background

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

In the *McKnight case*, the initial petition was presented to the Board of Water Engineers by a riparian water right claimant in Reeves County who was entitled to receive water from a canal company who claimed rights by appropriation. The hearing was to be held in Ward County. At the time there was a pending suit in federal court seeking to adjudicate water rights on the Pecos River involving these and other parties. There was another suit in the district court of Reeves County by Ward County District No. 1 against the Farmers Independent Canal Company to determine relative rights of claimants to waters of the Pecos. *See, McKnight v. Pecos and Torah Lake Irrigation Company*, 207 S.W. 599, Tex. Civ. App. (1918).

In *McKnight*, the plaintiff sought an injunction, contending that §§ 105 to 132 of the 1917 Act were unconstitutional. The trial court denied the injunction, but on appeal, the injunction was granted and the Supreme Court affirmed. The Supreme 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 from, as is given to a judgment of a court of competent jurisdiction, thereby violating the constitution's separation of powers doctrine.

The *McKnight* court did not mention or discuss the 1917 Conservation Amendment because the underlying adjudication proceeding was commenced prior to adoption of the Amendment. Significantly, the Amendment gave the Legislature control over the development and conservation of water resources and the production of oil and gas. Later, in *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (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 oil and gas 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, it 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 effectively emasculated the Board of Water Engineers, thwarting orderly development of the State's surface water resources and creating a "desert" in the certainty of surface water law for some forty years. The Board ceased to function in the role of quantifying and managing surface water rights during a period, it was later observed by the Texas Supreme Court, that water law in Texas prior to 1967 "was in a chaotic state . . ."

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

Following the drought of record, the Legislature again tried to delegate to the Board of Water Engineers the power to adjudicate water rights. *See*, Stahle, D.W., and M. K. Cleaveland, 1988: *Texas Drought History Reconstructed and Analyzed from 1698 to 1980*. *J. Climate*, 1, 59-74, at 66. In 1953, while the *Valley Water case* was in process, Article 7477 (Article 7477 (§§ 12-13) (Vernon 1953), Acts 1953, 53rd Leg., p. 874, ch. 357, § 1 was enacted. 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 right claims were final with no right to appeal, they violated the separation of powers doctrine.

Article 7477 was also invalidated by the Texas Supreme Court in *Southern Canal Co. v. Texas Board of Water Engineers*, 1956 Tex. 227, 318 S.W.2d 619 (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" in a *trial de novo* appeal as opposed to the "substantial evidence" which is applicable to decisions by the Board as other agencies of the State on appeal to the courts. Again, the Legislature's attempt to quantify and evaluate water rights in the State was frustrated.

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

A water rights adjudication bill was introduced in 1965 consistent with the Research League study. It followed the "Wyoming" adjudication 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 various alternatives: (1) a special water court; (2) the Oregon type approach mentioned in the *McKnight* case; and (3) the Wyoming type adjudication act. A modified "Oregon" type water rights adjudication bill was finally agreed upon containing provisions for automatic appeal to court on a trial *de novo* basis. It was an enacted by the 60th Legislature and signed by Governor Connelly on April 13, 1967. S*ee, In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438 at p. 445.

2. The Adjudication Act

The Adjudication Act, § 11.303, *et. sec.*, Texas Water Code, established a statewide process. All water right claimants, except domestic and livestock claimants (whether statutory claimants or riparian claimants), had to file sworn claims by September 1, 1969. Certain riparian claims were required to file by July 1, 1971. §11.303, Texas Water Code. Non-statutory claims were limited to maximum beneficial use between 1963 and1967. The Act did not recognize any water right claim that did not exist before August 28, 1967. The Act expressly excluded claims for domestic or livestock uses.

The Act addressed the dual system of water rights and was an improvement over previous legislation, which addressed only statutory rights. Under this process, when a claim was filed, the Commission staff completed an Investigative Report cataloging and describing all claims previously filed. These 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 and a hearing. The Act established the procedure for contests and exceptions to the agency's preliminary determination, resulting in a final determination. the Act allow for proper initial adjudication and narrowing the issues by administrative determination for later court decisions only on those issues, as identified by the parties, in the adjudication process. This administrative process eliminated the chaotic judicial process of adjudication previously experienced in the courts. The

final determination was automatically filed in court where it was considered *de novo* on issues defined during the administrative process and presented to the court. *See,* Caroom and Elliott, *Water Rights Adjudication - Texas Style,* 44 Tex. B. J. 1183 (1981).

The first adjudication conducted was in the Middle segment of the Rio Grande between Falcon Reservoirs and Amistad Reservoir immediately upstream from the court adjudicated rights in the *Valley Water case*. At the beginning, the Commissioners actually heard these adjudication cases themselves, but because of the overwhelming tasks involved, later they were assigned to hearing officers. The Commission conducted the Upper Rio Grande adjudication for the segment above Amistad Reservoir and below Fort Quitman, Texas, and continued by adjudicating all rivers in the State of Texas. It completed the adjudication process with the adjudication of the Upper Rio Grande segment above Fort Quitman, Texas, to the state line in 2007. *In re: the 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 the Commission issued Certificates of Adjudication to all parties with a water right recognized in the adjudication proceedings. A certificate evidences an existing water right in the stream segment that is adjudicated. § 11.322, Tex. Water Code. Permits issued subsequent to an adjudication on a stream segment are now simply added to the records in the Commission as a water right and are subject to the same regulation as adjudicated rights. Tex. Water Code § 11.336.

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 watermaster program was intended to give assurance to 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 §§ 11.325 -11.333, Tex. Water Code, which allowed the Commission, once rights were adjudicated, to appoint a watermaster to oversee water use and utilize the tools of regulating that use provided in the statute.

The watermaster provisions have not been implemented statewide as provided by the Adjudication Act. A watermaster program exists on the Rio Grande, initially implemented by the court in the Valley Water case and later by the Commission in the Middle and Upper Rio Grande adjudications. The South Texas Watermaster program originally covered the Colorado, Guadalupe, San Antonio and Nueces Rivers, implemented in the adjudication process. Later, the Lavaca and Navidad Rivers, were added by a Commission Order based on a Petition of water right holders on those Rivers. It now also covers the Concho Watershed pursuant to Petitions filed under §§ 11.451, *et. seq.* Texas Water Code, and by special legislation in 2005, in H.B. 2815 adding §§ 11.551-11.560 to the Tex. Water Code which established the Concho River Watermaster Program, *see*, *City of San Angelo v. Texas Comm. on Environmental Quality and*

Concho River Basin Water Conservancy Association (Cause No. GV4-03796, 53rd Judicial District Court, Travis County, 2005) *see, also, City of San Angelo v. Texas Natural Resources Conservation Comm'n,* 92 S.W.3d 624 (Tex.Civ.App.-- Austin 2002).

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 either at the agency or District Court level. There are a few decisions, however, of note.

The first case under the Adjudication Act to reach the appellate courts was *In re Water Rights of Cibolo Creek Watershed of San Antonio River Basin,* 568 S.W.2d 155 (Tex.Civ.App.-- San Antonio, May 24, 1978). One water rights claimant on the Cibolo Creek, who had been recognized a right based upon prescription and equity on one tract of land but denied a right on another tract, challenged the district court's decision. The appellant asserted 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 applying the *Valmont case* 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 since the claimant had no vested property right, he did not have standing to raise the constitutionality of the Adjudication Act. Not long after the decision in the Cibolo Creek Case, 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. *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).

In re the 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 right claimants could be restricted to a defined water right based upon use during a test period. Such restriction did not constitute a taking of property without just compensation because they received due process notice and hearing and there was an automatic appeal of the administrative determination and trial *de novo*.

On the same day, the Supreme Court in *In re the Adjudication of Water Rights in the Llano River Watershed of the Colorado River Basin,* 642 S.W.2d 446 (Tex.Sup.Ct. 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 in the State. "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." At p. 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.

The next case issued by an appellate court is *re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River*, 670 S.W.2d 250 (Tex.Sup.Ct., May 2, 1984), in which the Supreme Court affirmed the Commission's holding that a riparian was restricted to use during the 1963-1967 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 a 1833 Mexican Grant did not own all of the waters of Medio Creek (tributary to the Medina River) and could only be adjudicated the amount of water shown to have been used during the statutory period.

The adjudication process resulted in other significant appellate holdings. The appeal in *In re Contests of the City of Laredo, et. al. to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Tributaries*, 675 S.W.2d 257, reh. den. August 22, 1984 (Tex.Civ. - Austin, 1984) considered a Commission decision that the equitable water rights concept adopted in the *Valley Water case* would extend to rights in the Middle Rio Grande, because of the unique circumstances on the Rio Grande. The Commission lacked the powers of a court to recognize an "equitable right," nevertheless, upon review the Commission's finding was approved. The court also held that the law of New Spain did not expressly create a municipal water right in the nature of a "pueblo" water right. *In re Contests of City of Eagle Pass, to Adjudication of Water Rights in Middle Rio Grande Basin and Contributing Texas Tributaries,* 680 S.W.2d 853 (Tex.Civ.App. -- Austin, October 3, 1984), the Court affirmed the Commission's adjudication. 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.

In *In re Adjudication of Water Rights of Lower Guadalupe River Segment*, 730 S.W.2d 64, (Tex.App.-- Corpus Christi, April 02, 1987 (NO. 13-86-414-CV.), the court held Grien Lake was public water to which the appellant had no rights as a riparian claimant.

The *City of Eagle Pass* case was the only adjudication case reaching the appellate courts pertaining to appropriative rights claims. All others dealt with riparian right issues and the constitutionality of the Act in relation to riparian rights. Other than those in the 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 Act was successful; it reached amicable resolution to many complex issues that earlier courts found difficult to resolve in a judicial setting. The Act served its purpose of providing a statutory process meeting due process and separation of powers requirements to finally adjudicate existing water rights in the State.

5. Goals of the Adjudication Act

The goals of the Adjudication Act were to quantify and inventory all water rights. This was 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 in the State could be quantified and identified. This included both statutory and non-statutory claims, with certain exceptions. This was 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 upon use, to the maximum demonstrated beneficial use during a prescribed period prior to the effective date of the Act. § 11.303, Tex. Water Code. 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 quantitative 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. In this sense, 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 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, while others continue to be litigated today.

1. Domestic and Livestock Use

The Adjudication Act specifically excluded the adjudication of domestic and livestock use claims. 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 use on land that abuts a stream developed separately from the same right for use on land that does not abut a stream.

(a) Spanish and Mexican Law Influence

The early Spanish and Mexican law generally provided for domestic and livestock use in the ditch or acequias systems. Under the laws of Spain there were certain "common to all uses" that did not require a grant from the sovereign. Waters in the Rio Grande could be used by all for " . . . drinking by men and animal; as a highway, for the navigation of boats and sailing ships; for fishing; and for domestic necessities." *Valmont Plantations*, 346 S.W.2d 853 at 854 f.n. 1. "[T]the waters of navigable rivers" could be used by all "persons in common." Among the common uses were navigation, mooring of boats, making repairs on ships or sails, landing merchandise, fishing, and drying of nets. 346 S.W.2d 853 at p. 857. All waters of public rivers were for public and common use and anyone could use the water for domestic purposes. *Valmont* case, 346 S.W.2d 853, at 860-861 citing with approval the Spanish commentator Lasso de la

Vega. See also, *In re: the Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250 at p. 254 (A grant from the sovereign was not " . . . needed to take water . . . from a public stream for domestic or personal use. Citing De La Vega, *Reglamento General De Las Medidas de Aguas*, reprinted in M. Galvan, *Ordenanzas de Tierras y Agus* (1844) 155 - 157. 670 S.W.2d 250 at 254).

(b) Statutory and Common Law Background of Domestic and Livestock Use Claims

The Irrigation Act of 1889 did not mention the 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." *1889 Act, 21st Leg. RS, ch. 88, § 10.* This reference to 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. This was designed 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 therefrom as may be necessary for drinking purposes for himself, family and employees, and for drinking purposes for his and their livestock** . . .

Acts 1895, 24th Leg. RS ch. 21, § 10 (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 landowners who own land which abuts a stream, the landowner's family and employees, and the landowner's livestock, and restricts the use of water to these limited 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.

> 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.

Kinney, On Irrigation and Water Rights, § 692, p. 1195-6 2d Edition (1912).

In speaking of the domestic and livestock use, a distinction was made between "natural" and "artificial use." Natural uses referred to uses necessary to sustain life, as opposed to artificial uses, which do not depend upon necessities, but bear on the question of business, profit, pleasure, or comfort. The domestic and livestock use was given preference over artificial uses, whether appropriative or riparian rights. It was based upon 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, On Irrigation and Water Rights*, § 487, p. 825-826 2d Edition (1912). Some of these concepts found their way into Texas water law.

The 1925 Act, Acts of 1925, 30th Leg. ch. 136, p. 341, § 1 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*," (emphasis added). This provision was derived from the 1913 Act and 1917-1918 Acts, which later became Article 7470, Vernon's Ann. Civ. Stat. art. 7470 (1954). These provisions allow for a permit or certified filing to appropriate water for domestic use on land which does not abut a stream. These provisions have continued through codification in 1971, when these provisions first became § 5.001 and now § 11.001, Texas Water Code. The statutes provide for appropriation of water for domestic use in cases where the use of water is not on land abutting a stream and give it the first priority in the case of competing applications for a permit.

The Texas Commission on Environmental Quality rules provide a definition of domestic and livestock use both prior to and *after* the Adjudication Act, which excluded domestic and livestock use from adjudication. The current regulation defines 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 if given or received or for which the product of the activity is sold.

30 Tex.Admin. Code § 297.1(18). Livestock use is defined as:

> 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(18).

Section 297.21(a) 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; and § 304.21(a), (d)(3) allows a watermaster to protect domestic and livestock uses in times of low flows. These provisions are consistent with prior law. Additionally, permits issued after the 1913 Act, generally are made subject to "superior rights," and some have equated this to the exempted domestic and livestock rights on property abutting 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 abutting one's property for one's own domestic and livestock use.

Use of water for domestic and livestock use on land which does not abut a stream may be appropriated from the stream pursuant to the appropriation and permitting system.

2. Domestic and Livestock Reservoirs

The Adjudication Act did not cover some other exempted statutory claims, such as certain reservoirs, including those for domestic and livestock use. 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. 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 employees, and for drinking purposes for his and their livestock, *and* any one whose land may be located within 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 employees, and for his and their livestock*.

Acts 1895, 24th Leg., Reg. Sess., Ch. 21, Sec. 10, p. 23. (Emphasis added). This law 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*.

Acts 1917, 35th Leg., Reg. Sess., Ch. 88, Sec. 16, p. 215. Article 7496, R.C.S. (Emphasis added). Thus, the initial reservoir exemption in 1895 was for domestic and livestock use. It was repealed in 1913. For 4 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 500 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 fifty acre-feet of water for domestic and livestock purposes without the necessity of securing a permit therefore." Acts 1925, 39th Leg., Reg. Sess., Ch. 136, Sec. 5, p. 344 Vernon's Ann. Civ. Stat. art. 7500a (1925). The Attorney General ruled the 1925 Act unconstitutional, so the nature and extent of this exemption was clouded until it was re-enacted 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 therefore." Acts 1941, 47th Leg. Reg. Sess., Ch. 37, p. 53, Sec. 1.

In *City of Anson v. Arnett, et. al.*, 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 100 acre feet. The plaintiff 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. When the dam was built in 1934 and 1935, its capacity was less than two hundred acre feet of water. Over time, the dam had fallen into disrepair, and at times could only hold fifty acre feet. In 1951, the dam was repaired to impound about ninety acre feet. The plaintiff argued that the 1925 Act was void, apparently based upon 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 appellant'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.

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."

Regardless of which statute controlled, Art. 7496 (enacted in 1917) or Art. 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 upon 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 size and purpose of use requirements, the court also addressed the issue of which statute applied to the dam and reservoir, finding that the 1941 Act did not apply, stating:

> [L]imitation 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 effected 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 450 at 452-453.

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 (1) its construction under the existing statute at the time; (2) within the capacity limitations and purposes of use provided by the then existing statute; and (3) must be constructed on land owned by the landowner.

The reservoir exemption continued to be modified by the legislature. The acre-feet restriction was increased to 200 acre-feet in 1953. Acts 1953, 53rd Leg., p. 592, 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." Acts 1959, 56th Leg. p. 260, ch. 151, § 1; Vernon's Ann. Civ. Stat. art. 7500a (1954).

A later case which considered the reservoir exemption is *Garrison v. Bexar-Atascosa Counties W.I.D. No. 1*, 404 S.W.2d 376 (Civ.App. 1966, error ref'd, n.r.e.). In this case, the Court of Appeals affirmed a trial court judgment which validated a permit authorizing a dam and reservoir on the west prong of the Medina River, a navigable stream, with a storage capacity of 162 acre feet for domestic and livestock purposes, with the right to divert 57 acre feet for irrigation purposes. The appeals court held that the State owns the bed and banks of navigable

streams and not the landowner. The Texas Supreme Court, *per curiam*, 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 existing 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.

The law continued to evolve. In 1971, Article 7500a was repealed and became §§ 5.140-141 of the Texas Water Code, which is currently § 11.142. Section 11.142 allows broader uses of the water in such an exempt reservoir, but 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 non-navigable stream, the right to impound a limited amount of water. The terms controlling such an exemption are those found in the law in effect when the dam was constructed.

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 current statutes.

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. Hutchins, *The Texas Law of Water Rights*, (1961), p. 251. Later statutes governing creation and operation of private canal corporations were found in Articles 7552, *et. seq.*, Vernon's Civil Statutes. The provisions relating to service of contiguous lands are now found in Texas Water Code §§11.036 - 11.041.

The court decisions interpreting and applying 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, et. al. v. Trespalalacios Rice & Irrigation Co.*, 98 Tex. 494, 86 S.W. 11, (Tex.Sup.Ct. 1905; err. ref. 204 U.S. 667); *Lakeside Irrigation Co. v. Buffington*, 168 S.W.2d 21 (Tex.Civ.App.- - San Antonio, 1914); *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, 208 S.W. 904 (Tex. Comm. App. 1919, approved by Tex. Sup. Ct.); *Knight v. Oldham*, 210 S.W. 567 (Tex.Civ.App. - - El Paso, 1919); *Mudge v. Hughes*, 212 S.W. 819 (Tex.Civ.App.-- San Antonio, 1919); *McBride v. United Irr. Co.*, 211 S.W. 498 (Tex.Civ.App.-- San Antonio, 1919); *Edinburg Irr. Co. v. Paschen*, 223 S.W. 329 (Tex.Civ.App.-- San Antonio, 1920), 235 S.W. 1088 (Tex.Comm.App. 1922); *Ball, et. al. v. Rio Grande Canal Co., et. al.*, 256 S.W. 678 (Tex.Civ.App.-- San Antonio, 1923, err. ref.); *Fairbanks v. Hidalgo County W.I.D. No. 2*, 261 S.W. 542, (Tex.Civ.App.-- San Antonio, 1923); *Chapman v. American Rio Grande Land &*

Irrigation Co., 271 S.W. 392 (Tex.Civ.App.-- San Antonio 1925, err. ref.)*; Edinburg Irr. Co. v. Ledbetter*, 206 S.W. 1088 (Tex. Comm. App. 1926); *Van Horne v. Trousdale*, 10 S.W.2d 147 (Tex.Civ.App. - - El Paso, 1928, no writ hist.)*;Willis, et. al. v. Nueces Canal Co.*,16 S.W.2d 266 (Tex.Comm.App. 1929, approved by Tex. Sup. Ct.). These early cases generally construed these statutes to say that all landowners contiguous to a private canal company's distribution facilities having a right to demand the use of water from the canal company (or later successor water district) is entitled to water service on reasonable terms and rates. *Hutchins*, supra, pp. 251-252, 271-272, 279-280 and cases there cited.

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 § 11.038. This basic provision had appeared in every irrigation acts 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.

The only facilities which were "constructed and maintained" under the early statutes, prior to 1918 and passage of the Conservative Amendment, were those of private irrigation companies. The facilities of irrigation districts, water improvement districts, and water control and improvement districts were constructed and maintained under later statutes after 1918. Even in the situation where a water district takes over the facilities of a predecessor private irrigation company, these early statutes would not apply since the facilities are maintained under post - 1918 statutes, even though they may have been constructed by a private irrigation company under the pre-1918 statutes.

Thus these historical canal corporation water service rights appear to have limited applicability because most private canal companies in Texas have been converted into water districts. Nevertheless, the Court in *State v. Hidalgo County Water Control and Improvement District No. 18, et. al.*, 443 S.W.2d 728, at p. 748, 750-753, recognized water rights in claimants owning or holding possessory rights to lands "adjoining or contiguous" to canals of a predecessor private irrigation company, but whose land was not included in the boundaries of a successor water district. 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).

As mentioned above, during codification in 1971, the provisions relating to service of contiguous lands were codified as Texas Water Code §§11.036 - 11.041. Current Texas Water Code § 11.036, which as a codification could not change the substantive meaning of the law it codified, nevertheless appears to have changed the context and original aspect of these rights. After the codification of the Texas Water Code, a court held that these statutes were not limited to irrigation uses and private irrigation companies, but included other uses, including municipal use. The court extended the provisions to municipal suppliers in *Texas Water Commission, et. al. v. City of Dallas*, 591 S.W.2d 609 (Tex.Civ.App.-- 1979, Dallas).

The duty to serve, which historically arose out of the canal company and irrigation company statutes as discussed above, has also been broadened to include other water suppliers. In *City of San Antonio v. Texas Water Rights 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 was under a duty to serve the public without discrimination and at reasonable rates. See, also, *Allen v. Park Place Water Light and Power Co.*, (Tex. Civ. App. 1925, err. ref'd.) 266 S.W. 219.

Thus the duty to provide water under reasonable terms and at reasonable rates found in today's Texas Water Code, chapter 11, has its genesis in the State's desire to encourage agriculture and irrigation and support the construction and maintenance of waterworks designed for this purpose.

4. Wagstaff Act

The Wagstaff Act, Acts 1931, 42nd Leg., p. 217, ch. 128, § 2; Art. 7472 V.A.C.S. (1954), was enacted by the Legislature in 1931 because there was 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 was 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, hydro-electric power, navigation, and recreation, in that order. Further, it stated that:

> [a]s between appropriators, first in time is the first in right, 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 therefore, . . .

This provision was highly controversial for over fifty years, because it appeared to provide a mechanism for making water available for municipal use on a water course (except the Rio Grande) that was otherwise fully appropriated. 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 S.B. 1, when it repealed Texas Water Code § 11.028, the successor provision.

5. Forfeiture and Cancellation of Water Rights

Another aspect of surface water law development not involved in the Adjudication, but which 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, Acts 1917, p. 222, was the first statute to provide a means by which an appropriative water right could be terminated. Later, Article 7544, Vernon's Civil Statutes (1954) 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 water rights holders in *City of Anson v. Arnett*, 250 S.W.2d 450, (Tex.Civ.App.-- 1952, ref. n.r.e.), 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. This is consistent with judicial disfavor of forfeiture of rights. According to the court, mere failure to repair a dam or facilities or non-use of water is not probative evidence of an intent to abandon a water right. *See*, *also*, *Lower Nueces River Water Supply Dist. v. Cartwright*, 274 S.W.2d 199 (Tex.Civ.App.-- 1955, ref. 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.-- 1923) held that Article 7544 did not give the Board of Water Engineers the power to forfeit rights because to do so would violate Article 1, § 1 of the state constitution by giving judicial powers to an administrative agency.

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 (90) days, or as extended. Similar authority has been carried forward in Texas Water Code § 11.146, which establishes procedures, including a hearing, for forfeiture proceedings.

In the codification process in 1971, the forfeiture provision in Article 7544, Vernon's Civil Statutes (1954), was repealed, Acts 1971, 62nd Leg., p. 658, ch. 58, § 2, eff. Aug. 30, 1971, leaving cancellation as the only statutory means through which an appropriative right may be terminated.

(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 by providing:

> 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 canceled.

Acts 1953, 53rd Leg., p. 867, ch. 352, § 1.

Cancellation of water rights pursuant to statute was upheld as constitutional in *Texas Water Resources Comm'n v. Wright*, 464 S.W.2d 642 (1971). The court held that the issuance of a permit authorizes the beneficial use of water and a permittee does not acquire the right of non-use 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 and the cancellation statute provides a reasonable remedy for the state's enforcement of this condition subsequent after fair opportunity for notice and hearing. The failure on the part of a permittee to protect his rights is no excuse because 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.

III. 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 upon the appropriation doctrine controlled by the State Constitution and legislation passed pursuant to the State 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 Texas Commission on Environmental Quality governing 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 and the judiciary, and when necessary, the people in amendments to our Constitution, but our current surface water law system has matured through this evolution and is one which can be built upon to meet the future water resource needs of the State's citizens.