St. Mary's Law Journal

Volume 3 | Number 1 Article 11

3-1-1971

An Appropriator Acquires a Vested Right in the Beneficial Use of Water Allocated to Him but Does Not Acquire a Vested Right to the Non-Use of Water Thus Allocated - Article 7519A Is a Retroactive Law Not Prohibited by the Texas Constitution Because It Does Not Operate as a Deprivation of a Vested Right.

Richard Gary Thomas

case will not make the task easier since the final result will still turn on the discretion of the judges. The Supreme Court did lend stability to the area of guilty pleas when accompanied by a claim of innocence. However, like all questions involving sufficiency of evidence, the authoritative value of this decision is limited. Each case must be considered on its own facts and there is little room for the principle of stare decisis in this area.

P. Blake Hedblom

WATERS AND WATERCOURSES—CONSTITUTIONAL LAW—AN APPROPRIATOR ACQUIRES A VESTED RIGHT IN THE BENEFICIAL USE OF WATER ALLOCATED TO HIM BUT DOES NOT ACQUIRE A VESTED RIGHT TO THE NON-USE OF WATER THUS ALLOCATED—ARTICLE 7519A IS A RETROACTIVE LAW NOT PROHIBITED BY THE TEXAS CONSTITUTION BECAUSE IT DOES NOT OPERATE AS A DEPRIVATION OF A VESTED RIGHT. *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. Sup. 1971).

Respondent's predecessor acquired permits to appropriate and divert a certain amount of water for irrigation purposes from the Rio Grande River in 1918 and 1928. The permits were obtained under the Water Appropriation Act of 1917 which requires proof of willful abandonment as a ground for revoking water appropriation permits. Respondent's permits were used in conformity with statutory requirements until a flood destroyed the irrigation pumps in 1954. Since that date the Respondents have not diverted any water for irrigation. The state took action under Article 7519a and revoked the permits. Respondents brought suit challenging the constitutionality of Article 7519a. The trial court ruled in favor of the state. On appeal the court of civil appeals reversed this decision on the ground that a right to use water is vested and Article 7519a being retroactive was unconstitutional. The respondents appealed to the Supreme Court of Texas. Held—*Reversed —judgment of the trial court affirmed.* An appropriator acquires a vested right in the beneficial use of water allocated to him but does not acquire a vested right to the non-use of water thus allocated—Article 7519a is a retroactive law not prohibited by the Texas Constitution because it is not a deprivation of a vested right.

35, 40 (9th Cir. 1970) where the court, attempting to ease the burden, set four requirements that must be met for a defendant to obtain a habeas corpus hearing on an alleged involuntary guilty plea:

> . . . (1) the naming, or description, of persons involved; (2) an account of the relevant acts or conduct of such persons; (3) an account of the time and place where such acts or conduct took place; and (4) a statement of how such acts or conduct prejudiced the petitioner.

The court also stated that such allegations cannot be vague and conclusionary.

Water law has been separated into two categories in the United States. The Eastern states utilize the common law or riparian doctrine that is based on land ownership[1] and reasonable use.[2] The appropriation theory arose in those states where the scarcity of water was of constant concern.[3] The object behind the substantive principles of appropriative water law is to obtain maximum usage from the available water supply for the enhancement of the largest number of people.[4] The all encompassing phrase is the "beneficial use" of water.[5] Due to various conflicts in the judicial process[6] ten western states recognize both the riparian and appropriative doctrines, but of the two the appropriative doctrine is favored.[7] Texas recognizes both doctrines.

The riparian doctrine in Texas was first recognized in the year 1856.[8] Later, Texas followed other semi-arid western states and adopted an appropriative system of allocating water in 1889,[9] but while so doing it did not repudiate the rights of riparian owners. Therefore, Texas had a dual system of water law. The riparian system developed in the courts while the appropriative right was a creature of statute.[10]

The riparian right is inherent in the ownership of land in that one who owns land contiguous to a watercourse generally has a limited

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1 1 E. CLARK, WATERS AND WATER RIGHTS § 4.3 (1967).

2 Evans v. Merriweather, 4 Ill. 492 (1842). The riparian doctrine had its origin in England. A landowner acquired his riparian right by virtue of his ownership of land contiguous to a watercourse. He was said to have a usufructory right to the natural flow of the stream. The majority of state jurisdictions following the riparian doctrine have modified this right to the reasonable use of the water. In determining whether a particular use is reasonable, all of the surrounding circumstances should be considered. *See generally* 1 E. CLARK, WATERS AND WATER RIGHTS § 51.1-51.3 (1967); 1 C. KINNEY, IRRIGATION AND WATER RIGHTS 450-551 (2d ed. 1912); J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 298, 306-12 (1962).

3 1 E. CLARK, WATERS AND WATER RIGHTS § 4.1 (1967).

4 Allen v. Petrick, 222 P. 451 (Mont. 1924); 2 C. KINNEY, LAW OF IRRIGATION AND WATER RIGHTS § 916 (2d ed. 1912).

5 Ward v. Kidd, 392 P.2d 183, 190 (Idaho 1964).

6 The primary problem facing western states was that the common law of England had been accepted or developed as the system of law to be followed, and the common law riparian doctrine was not best suited to meet the needs of semi-arid regions. The appropriative doctrine was much better suited to fulfill their needs. Thus arose the conflict between *the need for adherence to the common law* versus *the need for an efficient appropriate doctrine to meet the needs of a semi-arid region.* The courts compromised and recognized both doctrines. There were additional problems in Texas because the Texas courts recognized rights obtained from Spanish and Mexican land grants. A Texas Supreme Court decision held that the early Spanish and Mexican grants vested the same riparian rights in the grantees as did the English common law. It should be noted that a subsequent opinion held that the court was not correct in that the Spanish law did not recognize riparian rights. *See generally* Lux v. Hagin, 4 P. 919 (Cal. 1884); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926); State v. Valmont Plantation, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962); 1 WIEL, WATER RIGHT IN THE WESTERN STATES 111-22 (3d ed. 1911); W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 105-08, 122-45 (1961); 2 C. KINNEY, LAW OF IRRIGATION 627-40 (2d ed. 1912).

7 W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 107, 122-151 (1961).

8 Haas v. Choussard, 17 Tex. 588 (1856).

9 TEX. LAWS 1889, ch. 88; 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898).

10 W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 101 (1961).

right to the natural flow of the stream.[11] One's right to use the water is solely dependent on the location of the land to the stream. On the other hand, the appropriative owner acquires the right to divert and beneficially use water[12] allocated by complying with the statutory requirements.[13]

Traditionally, water has been considered real property,[14] although when it is severed from its natural state it is considered personal property.[15] While water may be classified as real or personal property, it is not subject to private ownership.[16] In Texas, the ownership of flowing water is in the State which holds it in trust for the public.[17] Thus, neither a riparian owner nor one who has acquired an appropriative right owns the corpus of the water,[18] but a mere usufructory right to use the water.[19]

The first appropriative water act in Texas appeared in 1889,[20] and was reenacted with little change in 1895.[21] Neither act made adequate provisions for the revocation of water rights granted by the State. In 1913 the legislature enacted a statute fully adopting the doctrine of prior appropriation.[22] This act provided that a finding of willful abandonment for three years was a ground for revocation of the appropriative right to divert water.[23] Before willful abandonment can be established it is essential that one prove non-use plus the subjective intent to abandon.[24] The Water Appropriation Act of 1917[25] amended the water act of 1913, but willful abandonment for three years still remained as the basis of revocation.[26]

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11 *Id.* at 102.

12 TEX. REV. CIV. STAT. ANN. art. 7542 (1954).

13 TEX. REV. CIV. STAT. ANN. art. 7542a (Supp. 1970).

14 2 W. BLACKSTONE, COMMENTARIES 18; New Mexico Products Co. v. New Mexico Power Co., 77 P.2d 634, 641 (N.M. 1937); Goodwin v. Hidalgo County Water Control and Improvement Dist., 58 S.W.2d 1092 (Tex. Civ. App.—San Antonio 1933, writ dism'd).

15 Brighton Ditch Co. v. Englewood, 237 P.2d 116, 120 (Colo. 1951); Hagerman Irrigation Co. v. McMurry, 113 P. 823, 825 (N.M. 1911); Bear Lake and River Waterworks and Irrigation Co. v. Ogden City, 33 P. 135, 136 (Utah 1893); W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 77 (1961); 2 C. KINNEY, LAW OF IRRIGATION 774, 1032 (2d ed. 1912); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES (3d ed. 1911).

16 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 15 (3d ed. 1911).

17 TEX. REV. CIV. STAT. ANN. art. 7467 (1954); Motl v. Boyd, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926).

18 Texas Co. v. Burkett, 117 Tex. 16, 25, 296 S.W. 273, 276 (1927); South Texas Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1952, writ ref'd. n.r.e.).

19 Haas v. Choussard, 17 Tex. 588, 589 (1856); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 18 (3d ed. 1911).

20 TEX. LAWS 1889, ch. 88 at 100; 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898).

21 TEX. LAWS 1895, ch. 21 at 21; 10 H. GAMMEL, LAWS OF TEXAS 751 (1898).

22 TEX. LAWS 1913, ch. 171 at 358.

23 *Id.* § 49 at 370.

24 City of Anson v. Arnett, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

25 TEX. LAWS 1917, ch. 88 at 211.

26 TEX. LAWS 1917, ch. 88 § 46 at 222.

In 1957, the legislature enacted Article 7519a[27] and formed a new basis for revoking the appropriative water permit. This act provides that permits issued ten years prior to August 21, 1957 or permits issued ten years previous to proceedings brought to cancel the permits are subject to revocation.[28] The ground for revocation is ten consecutive years of non-beneficial use of the water allocated. Proof of such non-use raises a presumption of willful abandonment[29] in that the holder of the permit has not been diligent in applying the water to beneficial use and that his failure to act was not justified.[30] The act further provides that upon a finding of such conduct the Board of Water Engineers has the authority to cancel the holder's permit.[31] Article 7519a essentially provides that non-beneficial use alone for ten years results in a forfeiture pending action taken by the state. The element of intent to abandon is no longer required for revocation of the permit.[32]

In the instant case, *Texas Water Rights Comm'n v. Wright*,[33] the permitees raised two issues challenging the constitutionality of Article 7519a. The primary contention of the permitees was that appropriative water rights acquired under the 1917 act were absolute vested rights which could not be taken away by the legislature. The second contention of the permitees was that since their appropriative right was a vested right, Article 7519a was a retroactive law prohibited by the Texas Constitution and the due process clause of the United States Constitution.

The court disposed of the first issue by admitting that the permitees

27 TEX. REV. CIV. STAT. ANN. art. 7519a § 1 (Supp. 1970).

28 TEX REV. CIV. STAT. ANN. art. 7519a § 1 (Supp. 1970) provides:
All permits for the appropriation and use of public waters heretofore issued by the Board of Water Engineers of the State of Texas, at least ten (10) years prior to the effective date of this Act or which shall have been issued at least ten (10) years prior to the date of the cancellation proceedings herein authorized, or certified filings filed with said Board . . . under which no part of the water . . . appropriated has been put to beneficial use . . . during a period of ten (10) consecutive years . . . shall be presumed to have been willfully abandoned.

29 In the instant case, Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642 (Tex. Sup. 1971), the court held this not to be a rebuttable presumption but a conclusive presumption.

30 TEX. REV. CIV. STAT. ANN. art. 7519a(1) (Supp. 1970) provides:
All permits . . . shall be presumed to have been willfully abandoned in that the holder has not been diligent in applying any of such unused water to beneficial use under the terms of the permit or certified filing for each year during the ten-year period and has not been justified in such non-use for each year during the ten-year period.

31 TEX. REV. CIV. STAT. ANN. art. 7519a § 1 (Supp. 1970):
[I]f the Board finds that no water has been beneficially used for the purposes authorized during such ten-year period, such permit or certified filing shall be deemed as willfully abandoned, shall be null, void and of no further force and effect, and shall be forfeited, revoked and cancelled by the Board.

32 Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 646 (Tex. Sup. 1971).

33 *Id.*

had a vested right to beneficially use the water[34] but that they did not have a vested right in the non-use of the water:

> [T]he vested rights which the permitees held by force of the two water permits, were rights limited to the beneficial use of water. Permitees at no time were vested with the rights of non-use of the water for an indefinite period of time. At all relevant times, the State had rights as the owner of the water. It also had a constitutional duty to preserve and conserve its water.[35]

The court recognized that legal precedent existed to the effect that a water right is a vested right. In *San Antonio River Authority v. Lewis,* the court stated that rights to waters acquired from Mexico have been held to be vested rights.[36] *State Board of Water Engineers v. Slaughter*[37] held that appropriative water rights acquired under the 1895 Act[38] constituted vested rights which could not be taken away by the legislature by subsequent enactment. The above cases appear to be based on the old traditional concept that when one acquires an interest in real estate it usually is considered a vested right. The corpus of the water being real estate the right to use water should be considered real estate.[39] Therefore, the right to use water should be a vested right.

The court rebutted this historically based logic using modern appropriative water law, the purposes of which are designed to meet the current demands of states that utilize the doctrine.

> Common to the law of the western arid regions and of appropriation law generally is the idea that non-use of appropriated waters is a waste of the water. Once water is appropriated, its availability to another user is reduced or defeated, and if the permitee does not use a substantial portion of it the water will run unused into the sea. A workable system of appropriative waters has produced the general rule that the beneficial use of waters is the conservation of the resource, whereas, the non-use of appropriate waters is equivalent to waste. . . . Inherently attached to a permit to appropriate waters, therefore, is the duty that the appropriator will beneficially use the water.[40]

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34 TEX. REV. CIV. STAT. ANN. art. 7542 (1954) defines a water right as follows:
A water right is a right to use the water of the state when such use has been acquired by the application for water under the statutes of this state. . . . Such use shall be the basis, the measure and the limit to the right to use water of the State at all times, not to exceed in any case the limit of volume to which the user is entitled and the volume is necessarily required and can be beneficially used for irrigation or other authorized uses.

35 Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648 (Tex. Sup. 1971).

36 363 S.W.2d 444 (Tex. Sup. 1962).

37 382 S.W.2d 111, 114 (Tex. Civ. App.—San Antonio 1964), *rehearing denied,* 407 S.W.2d 467 (Tex. Sup. 1966).

38 TEX. LAWS 1895, ch. 21 at 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898).

39 New Mexico Products Co. v. New Mexico Power Co., 77 P.2d 634, 641 (N.M. 1937).

40 Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 647 (Tex. Sup. 1971).

Therefore, the permitees did not acquire an absolute right to use the water, but only an absolute vested right to use the water for *beneficial* purposes.

The second contention of the permitees concerned the retroactivity of Article 7519a. The due process clause of the United States Constitution has provided a vehicle for protection from improper retroactive civil statutes.[41] Some states,[42] including Texas,[43] prohibit the passage of retroactive laws by constitutional provision. The policy behind the prohibition of such laws being that they affect conditions prior to their enactment and infringe upon personal rights.[44] Some jurisdictions contend that if a state has a constitutional provision prohibiting retroactive laws, the objective of the provision will be defeated if exceptions are allowed which permit privileged classes of retroactive laws to be passed.[45] However, most jurisdictions allow such exceptions where the retroactive law does not violate other constitutional principles.[46] Texas follows this reasoning in that all laws which are retroactive in nature are not prohibited.[47] A retroactive statute is permissible if it is not oppressive or unjust.[48] Likewise, a retroactive law that does not injure a vested right but only affects a pre-existing remedy and insures the public a natural right should be upheld.[49] A retroactive statute is also valid if a reasonable time has been given to exercise a remedy that has

41 U.S. CONST. art. I § 10. *See* U.S. CONST. art. I § 9 where the passage of ex post facto laws are forbidden, but there is no *specific* provision in the United States Constitution that prohibits the passage of civil retroactive laws.

42 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2204 (1943). *See* collected state constitutional provisions in Comment, *Campbell v. Holt—A Rule Or An Exception?*, 35 YALE L.J. 478, 482 n. 16 (1926).

43 TEX. CONST. art. I, § 16.

44 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2204 (1943).

45 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2204 (1943); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 367 (8th ed. 1927).

46 Gayle v. Edwards, 72 So.2d 848, 850 (Ala. 1954); Murphy v. Murphy, 108 S.E.2d 872, 875 (Ga. 1959); Commerce Trust Co. v. Weed, 318 S.W.2d 289, 299 (Mo. 1958); Baker v. Rose, 56 S.W.2d 732, 734 (Tenn. 1933); Kelly v. Republic Bldg. and Loan Ass'n, 34 S.W.2d 924, 927 (Tex. Civ. App.—Dallas 1930, no writ). *See generally* G. ENDLICH, INTERPRETATION OF STATUTES §§ 280-94 (1888); T. COOLEY, CONSTITUTIONAL LIMITATIONS 454-59 (6th ed. 1890); 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2204 (1943).

47 Mellinger v. City of Houston, 68 Tex. 37, 44, 3 S.W. 249, 252 (1887); Gastring v. Sovereign Camp, W.O.W., 278 S.W. 310, 312 (Tex. Civ. App.—San Antonio 1925, no writ). It is generally accepted that a retroactive statute must infringe upon a vested right before it should be considered invalid. *See* McCain v. Yost, 155 Tex. 174, 178, 284 S.W.2d 898, 900 (1955).

In an early case Justice Story defined a retroactive law as one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." Society for the Propogation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13156) (C.C.D. N.H. 1814).

48 Pepin v. Bealieu, 151 A.2d 230, 235 (N.H. 1959).

49 Mills v. Geer, 36 S.E. 673, 676 (Ga. 1900). *See* People v. Lindheimer, 21 N.E.2d 318 (Ill. 1939); Williams v. Reed, 160 S.W.2d 316, 317 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.); City of Fort Worth v. Morrow, 284 S.W. 275 (Tex. Civ. App.—Fort Worth 1926, writ ref'd) for cases upholding retroactive statutes which affect a remedy but not a vested right.

been discontinued.[50] The people of the State of Texas have a constitutional and a natural right to have the water of their state preserved in order to conserve the beauty of Texas and to promote its general economy.[51]

The court in the *Wright* case[52] held that the permitees could reasonably expect the State to exercise this natural right of the public, and that the revocation of the permits was a reasonable remedy. Thus it may not be said that Article 7519a was unjust or oppressive. In essence the contention of the permitees was that the retroactive effect of Article 7519a was unconstitutional because it operated as a divestment of a vested right of water use acquired under a pre-existing law. The court concluded that the act does have a retroactive effect. However, since the permitees did not have a vested right in the non-use of the water and the operation of Article 7519a was not oppressive or unjust, the act was not prohibited by the Texas Constitution nor the due process clause of the Federal Constitution.

The *Wright* decision establishes one point open to question wherein appropriative water rights are subject to conditions subsequent.

> [T]he water permits were grants to the permitees of usufructory rights to the State's water upon the implied conditions subsequent that the waters would be beneficially used.[53]

A usufructory right is not permanent property. When a usufructory right is not properly exercised the property ceases.[54] Carrying this logic a step further, a water right being usufructory should not be considered as being issued upon an implied condition subsequent. A water right should rather be considered as a determinable fee.[55] A title in the nature of a condition subsequent requires an overt act such as court action or re-entry before title reverts back to the grantor.[56] A title in the nature of a determinable fee has no such requirement because title reverts back to the grantor immediately upon breach of the condition imposed upon the fee.[57] Article 7519a provides:

> [I]f the Board finds that no water has been beneficially used for the purposes authorized during such ten-year period, such per-

50 Vance v. Vance, 108 U.S. 514, 521, 2 S. Ct. 854, 859, 27 L. Ed. 976 (1883); Wickelman v. Messner, 83 N.W.2d 800, 817 (Minn. 1957); Farmers Nat'l Bank and Trust Co. of Reading v. Berks County Real Estate Co., 5 A.2d 94, 95 (Pa. 1939); Bunn v. City of Laredo, 208 S.W. 675, 676 (Tex. Civ. App.—San Antonio 1919, *aff'd*, 245 S.W.426 (Tex. Comm'n App. 1922, jdgmt. adopted); 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2210 (1943).

51 TEX. CONST. art. XVI, § 59.

52 Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 649 (Tex. Sup. 1971).

53 *Id.* at 649.

54 1 WIEL, WATER RIGHTS IN THE WESTERN STATES § 286 (3d ed. 1911).

55 *Id.*

56 Lyford v. City of Laconia, 72 A. 1085, 1089 (N.H. 1909); J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 43 (1962).

57 J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 43 (1962).

> mit. . . shall be deemed as willfully abandoned, shall be null, void and of no further force and effect, and shall be forfeited, revoked and cancelled by the Board.[58]

The import of Article 7519a would be more nearly fulfilled if upon proof of ten years of non-beneficial use the appropriative right would automatically revert back to the state. Classifying the appropriative right as a condition subsequent may be detrimental because water will be wasted during time consuming appellate actions. The objective of the state should be to assure that water is constantly used for the benefit of society. It is entirely possible that in the future, the state may not be in a position to afford the time consuming appellate action taken by permitees who do not beneficially use water allocated to them. There have been predictions that by 1985 the demand for food and fibre will increase to the point where the farm economy will change from one of surplus to one of shortage.[59] The amount of irrigated acreage in Texas will need to increase fifty per cent by the year 2020.[60] It is only by making all irrigable waters available for irrigation, and keeping them available that such a goal may be met. Thus, it appears more desirable to classify the appropriation right as a determinable fee whereupon a finding of non-use for the statutory period, the right would automatically revert back to the state. The state would then have the immediate opportunity to efficiently allocate the water to someone else.

One of the basic principles of English and Anglo-American jurisprudence is to prevent property from existing in a state of dormancy where it will not be utilized for the benefit of society.[61] The *Wright* case[62] applies this concept to water law which is merely a sub-topic of property law. While irrigators who have held water permits for reserve purposes during draught seasons will be adversely affected by the *Wright* case,[63] the court's reasoning promotes the fundamental purpose of the appropriative doctrine by encouraging the beneficial use of water and discouraging the waste of water.[64]

The trend of the times is toward conservation and ecology because there is a present need to preserve our natural resources. Other western

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58 TEX. REV. CIV. STAT. ANN. art. 7519a, § 1 (Supp. 1970).

59 C. CLAY, THE TEXAS WATER PLAN: ISSUES AND ATTITUDES, IN CONTEMPORARY DEVELOPMENTS IN WATER LAW 160 (C. Johnson and S. Lewis ed. 1970).

60 *Id.*

61 *See* 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2013 (1961).

62 Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642 (Tex. Sup. 1971).

63 *Id.*

64 Allen v. Petrick, 222 P. 451 (Mont. 1924); State v. McLean, 308 P.2d 983, 987 (N.M. 1957).

A major criticism of the appropriative system is that it has a tendency to "fix" a right to the use of water in one individual indefinitely. *See* Laur, REFLECTIONS ON RIPARIANISM, 35 Mo. L. REV. 1 (1970). It is obvious that the *Wright* case modifies this fallacy to a certain extent.