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## STATUTORY NOTE

**WATER LAW—WATER ADJUDICATION ACT—A RIPARIAN OWNER CAN BE DIVESTED OF THE RIGHT TO THE USE OF THE WATER FLOWING BY HIS LAND FOR FAILURE TO TIMELY FILE FOR A PERMIT WITH THE TEXAS WATER RIGHTS COMMISSION. TEX. WATER CODE § 5.303 (i) (1971).**

The Texas Water Adjudication Act<sup>1</sup> provides that its purpose is to require recordation, adjudication, and administration of water rights, in order that the surface waters of this state may be put to their most beneficial use.<sup>2</sup> The legislation further sets forth that it is created in response to the expressed mandate of the Texas Constitution<sup>3</sup> and is within the exercise of the police powers of the state in the interest of the public welfare.<sup>4</sup>

The act adjudicates riparian and appropriative rights, other than claims under permits or certified filings which have been recorded.<sup>5</sup> A claim to a water right to which this act applies will be recognized as valid only to the extent of the maximum actual application of water to beneficial use without waste during any calendar year from 1963 to 1967, inclusive.<sup>6</sup> With some exceptions, these claims were to be filed on or before September 1, 1969.<sup>7</sup> Failure to do so extinguishes and bars any claim of water rights to which this section applies.<sup>8</sup> Though passed in 1967,<sup>9</sup> the constitutionality of this act has yet to be tested by the Texas Supreme Court.

The permit system in its entirety is recognized by experts in the field of water law as a step toward optimum utilization of surface water in Texas.<sup>10</sup> However, there remains the determination of the

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<sup>1</sup> TEX. WATER CODE § 5.301 (1971).

<sup>2</sup> TEX. WATER CODE § 5.302 (1971).

<sup>3</sup> TEX. CONST. art. XVI, § 59.

<sup>4</sup> TEX. WATER CODE § 5.302 (1971).

<sup>5</sup> TEX. WATER CODE § 5.303(a) (1971).

<sup>6</sup> TEX. WATER CODE § 5.303(b) (1971). An exception stated herein is made when a riparian claimant has, prior to August 28, 1967, commenced or completed construction of works designed to apply a greater quantity of water to beneficial use, the right shall be recognized to the extent of the maximum amount of water actually applied to beneficial use without waste during any calendar year from 1963 to 1970, inclusive.

<sup>7</sup> TEX. WATER CODE § 5.303(c) (1971); TEX. WATER CODE § 5.303(e) (1971) provides that a claimant desiring recognition of a right based on use from 1968 to 1970, inclusive, must file an additional statement on or before July 1, 1971; § 5.303(h) of the same act provides that a claimant may file as late as September 1, 1974 if he can show extenuating circumstances.

<sup>8</sup> TEX. WATER CODE § 5.303(i) (1971); TEX. WATER CODE § 5.303(l) (1971) states that this act does not apply to the use of water for domestic or livestock purposes.

<sup>9</sup> Texas Water Adjudication Act of 1967, codified at TEX. WATER CODE §§ 5.301-5.341 (1971).

<sup>10</sup> Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas*, in TEX. BAR ASS'N LEGAL INSTITUTE ON WATER . . . AND THE NEW TEXAS LAW 3, 39 (1968); Smith, *Recordation and Limita-*

constitutionality of a system of regulation of water rights that abolishes the riparian owner's right to initiate future uses subject only to its reasonableness. The constitutional problem involved is whether this alteration of the riparian system would amount to a taking of property for which compensation is required.<sup>11</sup>

The doctrine of riparian rights has composed a substantial part of the history of Texas water law.<sup>12</sup> Riparian rights originated in Texas with the adoption of the common law of England in 1840.<sup>13</sup> The doctrine was first applied by the Texas Supreme Court in 1856;<sup>14</sup> and in 1905, the court substantially set forth the riparian system as it now applies to Texas.<sup>15</sup> Stated simply, riparian rights arise out of the ownership of land through or by which a stream of water flows.<sup>16</sup> The right to natural wants is superior to other demands, such as irrigation and manufacturing.<sup>17</sup> Subject to the superiority of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream which flows by or through his land for the purpose of irrigation, provided such use is reasonable.<sup>18</sup> Reasonableness is determined by considering all the circumstances and conditions under which the use is made.<sup>19</sup> In 1926, the waters to which riparian rights attach were limited to the flow and underflow of streams below the line of highest ordinary flow.<sup>20</sup> The latest major decision concerning riparian rights in Texas determined that lands granted under the sovereign of Spain and Mexico carried no implied riparian right.<sup>21</sup>

As the principles of the Texas riparian system were developed, the riparian use of water was continuously considered a vested property right.<sup>22</sup> The vested property right theory has been largely a product

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*tion of Non-Statutory Water Rights*, in TEX. BAR ASS'N LEGAL INSTITUTE ON WATER . . . AND THE NEW TEXAS LAW 12 (1968); King, *Procedure For Adjudicating Water Rights*, in TEX. BAR ASS'N LEGAL INSTITUTE ON WATER . . . AND THE NEW TEXAS LAW 17 (1968).

<sup>11</sup> In *Parker v. El Paso County W.I. Dist. No. 1*, 116 Tex. 631, 642, 297 S.W. 737, 742 (1927), the court states: "The right of the riparian to his just proportion of riparian waters which flow by his land is an incident to his ownership of the land . . . . It is property within the constitutional guarantees." TEX. CONST. art. I, § 17: "no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ."

<sup>12</sup> W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 293 (1967).

<sup>13</sup> Tex. Acts of 1840; 2 H. GAMMEL, LAWS OF TEX. 177 (1840); TEX. REV. CIV. STAT. ANN. art. I (1969).

<sup>14</sup> *Haas v. Choussard*, 17 Tex. 588 (1856).

<sup>15</sup> *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733 (1905).

<sup>16</sup> *Id.* at 585, 86 S.W. at 735.

<sup>17</sup> *Id.* at 585, 86 S.W. at 735; W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 39 (1942). Natural wants are limited to water required for domestic and household purposes and water needed for livestock.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Motl v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926).

<sup>21</sup> *State v. Valmont Plantations*, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 163 Tex. 381, 355 S.W.2d 502 (1962).

<sup>22</sup> W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 303 (1961); *Zavala County Water Improvement Dist. No. 3 v. Rogers*, 145 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1940, no writ).

of Texas courts.<sup>23</sup> The courts have consistently maintained that the state is the owner of the corpus of the water;<sup>24</sup> thus, the riparian land owner does not claim a right in the ownership of the water itself.<sup>25</sup> The right to which the riparian owner maintains ownership is the *use* of the water that flows by or through his land.<sup>26</sup> This right of use has been regarded as a part and parcel of the land itself, i.e., a part of the grant of land when it was made by the sovereign.<sup>27</sup> An indication of the "right of use" attachment to the land is that the riparian use of the water automatically follows a transfer of riparian land, unless expressly reserved or previously sold.<sup>28</sup> As distinguished from the view that the riparian use is a part of the land itself, it has also been considered an easement which cannot be divested, except, perhaps, by condemnation.<sup>29</sup>

Regardless of whether it is described as a parcel of the land or as an easement attached to the land, a riparian proprietor's right to the use of water that flows by or through his land has consistently been held to be a private property right that is entitled to the full protection of the courts.<sup>30</sup>

Though the courts have uniformly upheld riparian rights, the legislature has recognized such rights only in connection with the passage of water appropriation legislation.<sup>31</sup> One statute does imply that the State of Texas recognized riparian rights in land grants from the state prior to 1895.<sup>32</sup> This implication arises from the statutory provision

<sup>23</sup> W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 156 (1961).

<sup>24</sup> Texas Co. v. Burkett, 117 Tex. 16, 25, 296 S.W. 273, 276 (1927). See TEX. WATER CODE § 5.021 (1971) for the statutory basis for state ownership of waters within the state.

<sup>25</sup> Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 129, 81 S.W.2d 653, 655 (1933); Richter v. Granite Mfg. Co., 107 Tex. 58, 61, 174 S.W. 284, 285 (1915).

<sup>26</sup> Texas Co. v. Burkett, 117 Tex. 16, 25, 296 S.W. 273, 276 (1927); Zavala County Water Improvement Dist. No. 3 v. Rogers, 145 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1940, no writ).

<sup>27</sup> Martin v. Burr, 111 Tex. 57, 64, 228 S.W. 543, 545 (1921).

<sup>28</sup> Bigham Bros. v. Port Arthur Canal and Dock Co., 91 S.W. 848, 853 (Tex. Civ. App. 1905), *reversed and remanded on other grounds*, 100 Tex. 192, 97 S.W. 686 (1906).

<sup>29</sup> Biggs v. Miller, 147 S.W. 632, 637 (Tex. Civ. App.—El Paso 1912, no writ).

<sup>30</sup> Chicago R.I. and G. Ry v. Tarrant County Water Control and Improvement Dist. No. 1, 123 Tex. 432, 447, 73 S.W.2d 55, 64 (1934); Mud Creek Irr., Agri., and Mfg. Co. v. Vivian, 74 Tex. 170, 173, 11 S.W. 1078, 1079 (1889); Houston Transp. Co. v. San Jacinto Rice Co., 163 S.W. 1023, 1027 (Tex. Civ. App.—El Paso 1914, no writ).

<sup>31</sup> Matagorda Canal Co. v. Markham Irr. Co., 154 S.W. 1176, 1180 (Tex. Civ. App.—Galveston 1913, no writ): "There is some confusion in the decisions of this state upon the subject of water rights in streams; but the following rules of priority of such rights are settled by statute . . . article 3117 [TEX. REV. CIV. STAT. art 3117 (1895)] of the statute under which appropriation of water is made, provides that the flow or the underflow of water shall not be diverted to the prejudice of the rights of the riparian owner unless he has consented to such diversion, or his riparian rights have been condemned." TEX. REV. CIV. STAT. ANN. art. 7469 (1954): "Nothing in this chapter shall prejudice vested private rights." TEX. REV. CIV. STAT. ANN. art. 7492a, § 2 (1954): "No provision of this act shall ever be construed to abridge or affect any vested rights of owners of any lands riparian to the waters of the streams of this State, or streams forming a boundary of this state." TEX. REV. CIV. STAT. ANN. art. 7507 (1954); TEX. REV. CIV. STAT. ANN. art. 7515a (1954); TEX. WATER CODE §§ 5.001(a), 5.133(b) (1971).

<sup>32</sup> TEX. WATER CODE § 5.006(b) (1971).

that the state does not recognize any riparian right in the owner of any land, the title to which passed out of the State of Texas after July 1, 1895.<sup>33</sup> While the legislature has been silent in defining a riparian right, it has recognized the existence of the riparian doctrine in Texas and its status as a vested right. This, joined with the voluminous case law on the subject, creates a substantial case for the assertion that a riparian right is *property* protected by the Texas Constitution.<sup>34</sup>

Since this would be a case of first impression in this jurisdiction, it is probable that the Texas courts will look to other jurisdictions which have enacted the same type of legislation. Three states—Oregon, Kansas, and South Dakota—have been presented with the issue of the constitutionality of the permit system and have decided adversely to the riparian proprietor.

In Oregon, some early decisions followed the common law doctrine of riparian rights.<sup>35</sup> However, in 1909, the Oregon Legislative Act<sup>36</sup> defined and limited these vested rights in water to include only the right to continue to use water in a beneficial manner and only to the extent of that beneficial use prior to passage of the act.<sup>37</sup> This was challenged as a taking of property without due process of law.<sup>38</sup> In upholding the act as a proper exercise of the police power, the court stated that public interest and welfare required that Oregon water resources be used in a manner which would insure the highest development of the resources of the state.<sup>39</sup> In this opinion, the court emphasized that water rights, like all other property rights, are subject to reasonable regulations enacted in the interest of the general welfare of the people.<sup>40</sup> Subsequently, a federal court upheld the Oregon Act in *California-Oregon Power Co. v. Beaver Portland Cement Co.*<sup>41</sup> The court acknowledged that the complainant possessed substantial property rights as a consequence of being a riparian proprietor; but it concluded

<sup>33</sup> *Id.*

<sup>34</sup> TEX. CONST. art. I, § 17.

<sup>35</sup> *Jones v. Conn*, 64 P. 855, 856, *rehearing denied*, 65 P. 1068 (Ore. 1901): "It is common learning that every person through whose premises a stream of water flows has a right to its use and enjoyment. . . ." *Shook v. Colshaw*, 12 Ore. 239 (1895); *Coffman v. Robbins*, 8 Ore. 279 (1880); *Taylor v. Welch*, 6 Ore. 199 (1876).

<sup>36</sup> ORE. REV. STAT. § 537.010 (Supp. 1969).

<sup>37</sup> ORE. REV. STAT. § 537.120 (Supp. 1969). ORE. REV. STAT. § 540.610 (Supp. 1969) also provides for the loss of vested rights if the common law claimant failed to use his water rights for a period of five years.

<sup>38</sup> *In re Willow Creek*, 144 P. 505, 514 (1914), *modified on other grounds*, 146 P. 475 (Ore. 1915). ORE. CONST. art. I, § 18: "Private property shall not be taken or damaged for public use . . . without just compensation; . . . provided that . . . water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

<sup>39</sup> *In re Willow Creek*, 144 P. 505, 513 (1914), *modified on other grounds*, 146 P. 475 (Ore. 1915).

<sup>40</sup> *Id.* at 514.

<sup>41</sup> 73 F.2d 555 (9th Cir. 1934), *aff'd on other grounds*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

that these property rights, like all other property interests, are subject to the police power of the state and may be modified by the legislature in the interest of the general welfare.<sup>42</sup>

Kansas, which had previously followed the riparian theory of water use,<sup>43</sup> adopted a similar act in 1945, which differed from the Texas act in that it adjudicated underground waters, as well as waters flowing in a stream.<sup>44</sup> A constitutional attack to determine riparian rights to surface waters was made in *State ex rel. Emery v. Knapp*.<sup>45</sup> The court held the enactment of this legislation to be a proper function of the legislature and found it to be within the scope of its police powers.<sup>46</sup> In *Baumann v. Smrha*,<sup>47</sup> a federal case, the plaintiffs alleged the act infringed upon their vested rights to waters underlying their land.<sup>48</sup> They maintained these rights were protected by the fourteenth amendment of the United States Constitution.<sup>49</sup> The court, while not distinguishing between underground and surface waters, said the state had the power to either modify or reject the doctrine of riparian rights if it is unsuited to the conditions of the state.<sup>50</sup> In holding a landowner did not have a vested right in the underground waters underlying his land which he has not appropriated and applied to beneficial use, the court said:

*Even though prior decisions of a state court have established a rule*

<sup>42</sup> *Id.* at 562; Like other property, however, riparian rights are subject to the police power of the state and within reasonable limits may be modified by legislation passed in the interest of the general welfare.

<sup>43</sup> *Frizell v. Bindly*, 58 P.2d 95 (Kan. 1936); *Atchison, T. & S.F. Ry. v. Shives*, 166 P. 519 (Kan. 1917); *Clark v. Allamen*, 80 P. 571 (Kan. 1905); *Shanleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 24 (1877).

<sup>44</sup> KAN. STAT. ANN. § 82a (Supp. 1964). KAN. STAT. ANN. § 821-702 (Supp. 1964): "All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed." *Williams v. City of Wichita*, 374 P.2d 578, 590 (Kan. 1962): "The Act makes no distinction whatsoever between ground water and surface waters but applies to both the principles and procedures which are recognized by the laws of the seventeen western states as the appropriation doctrine."

<sup>45</sup> 207 P.2d 440 (Kan. 1949); See *Williams v. City of Wichita*, 374 P.2d 578, 585, 588 (Kan. 1962), for a definition of riparian rights in Kansas.

<sup>46</sup> *State ex rel. Emery v. Knapp*, 207 P.2d 440, 447 (Kan. 1949): "The change is an appropriate one for the legislature to make. Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others."

<sup>47</sup> 145 F. Supp. 617 (D. Kan.), *aff'd per curiam*, 352 U.S. 863, 77 S. Ct. 96, 1 L. Ed.2d 73 (1956).

<sup>48</sup> KAN. STAT. ANN. § 82a-701(d) (Supp. 1964): "'Vested right' means the right of a person under a common law or statutory claim to continue the use of water having actually been applied to any beneficial use, including domestic use, on or before June 28, 1945, to the extent of the maximum quantity and rate of diversion for the beneficial use made thereof." See *Williams v. City of Wichita*, 374 P.2d 578, 585 (Kan. 1962), for a history of Kansas underground water law.

<sup>49</sup> U.S. CONST. amend. XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

<sup>50</sup> *Baumann v. Smrha*, 145 F. Supp. 617, 624 (D. Kan.), *aff'd per curiam*, 352 U.S. 863, 77 S. Ct. 96, 1 L. Ed.2d 73 (1956).

*of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment . . . .* Likewise, it is well settled that a legislature may change the principle of the common law and abrogate decisions made thereunder when, in the opinion of the legislature, it is necessary in the interest of public welfare.<sup>51</sup>

In South Dakota, water rights had been held to be property interests protected by the state constitution.<sup>52</sup> Nevertheless, in 1955, South Dakota adopted a water appropriation act patterned after the Oregon and Kansas Acts.<sup>53</sup> The statute limited vested rights to include only those being exercised at the time the statute was enacted or three years prior thereto.<sup>54</sup> This legislation was tested in 1964 in *Knight v. Grimes*.<sup>55</sup> The South Dakota Supreme Court came to the conclusion that common law water rights were not property in the constitutional sense and could be modified or rejected entirely without such being a taking of property.<sup>56</sup> It further concluded that even if water rights were vested property interests, they were nevertheless subject to regulations which impair or completely abrogate existing water rights where the public welfare so requires.<sup>57</sup>

It is evident, then, that the courts in Oregon, Kansas, and South Dakota upheld the constitutionality of legislative acts similar to the Texas Water Adjudication Act. This was done on the basis of the application of the following rules:

1. By means of the police powers of the state, the legislature has the right to regulate state water resources for the benefit of the public welfare.<sup>58</sup>
2. There is no vested right in a decision of a court. The legislature can change a principle of the common law when it is necessary in the interest of public welfare.<sup>59</sup>
3. Common law water rights are not property in a constitutional sense and can be rejected entirely without such action being considered a taking of property.<sup>60</sup>

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<sup>51</sup> *Id.* at 625. (Emphasis added.)

<sup>52</sup> *St. Germain Irrigating Co. v. Hawthorne Ditch Co.*, 143 N.W. 124, 126 (S.D. 1913).

<sup>53</sup> S.D. COMP. LAWS § 46-1-1 (1967). See also Comment, *Water Rights and the Constitutionality of the 1955 South Dakota Water Act*, 11-2 S.D.L. REV. 374, 376 (1966).

<sup>54</sup> S.D. COMP. LAWS § 46-1-9(1) (1967).

<sup>55</sup> 127 N.W.2d 708 (S.D. 1964).

<sup>56</sup> *Id.* at 712.

<sup>57</sup> *Id.*

<sup>58</sup> *In re Willow Creek*, 144 P. 505, 514 (1914), modified on other grounds, 146 P. 475 (Ore. 1915).

<sup>59</sup> *Baumann v. Smrha*, 145 F. Supp. 617, 625 (D. Kan.), aff'd per curiam, 352 U.S. 863, 77 S. Ct. 96, 1 L. Ed.2d 73 (1956).

<sup>60</sup> *Knight v. Grimes*, 127 N.W.2d 708, 712 (S.D. 1914).

The Texas courts have applied two of these rules in other areas of water law.<sup>61</sup> The operation of these rules is brought out in *Miller v. Letzerich*.<sup>62</sup> In that case, the court upheld a statute as constitutional which abrogated the common enemy doctrine of surface waters.<sup>63</sup> This doctrine stated that a property owner could alleviate his property of unwanted diffused surface waters in any manner desired, even to the damage of another's property.<sup>64</sup> The doctrine had been adopted as part of the common law in the same manner in which the riparian doctrine came into existence in Texas.<sup>65</sup> Nevertheless, the court concluded that the state has the power to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community, and that all property rights are held subject to the fair exercise of that power.<sup>66</sup> The court also applied the theory that there is no vested right in a rule of decision prescribed by the adoption of the common law as indicated by the following statement:

It is elementary that the rules of the common law governing the use of property may be changed and a course of action prescribed where none existed before, or statutory actions and remedies in some instances may be substituted for previously existing rights and remedies under the common law.<sup>67</sup>

There appears to be no reason why the application of the rules in the *Miller*<sup>68</sup> case could not be applied in a constitutional test of the Water Adjudication Act.

The police power theory is further developed in a recent Texas Supreme Court decision.<sup>69</sup> That case, while not dealing specifically with water law, examined the police power of the legislature when performing the legislative function and concluded that the reasonableness of particular regulations imposed under this power is a matter addressed to the legislative department whose determination, in the

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<sup>61</sup> Texas courts have considered the use of riparian water rights as property within the constitutional sense. *Chicago R.I. & G. Ry. v. Tarrant County Water Control & Improvement Dist. No. 1*, 123 Tex. 432, 447, 73 S.W.2d 55, 64(1934); *Mud Creek Irr., Ag., & Mfg. Co. v. Vivian*, 74 Tex. 170, 173, 11 S.W. 1078, 1079 (1889); *Houston Transp. Co. v. San Jacinto Rice Co.*, 163 S.W. 1023, 1027 (Tex. Civ. App.—El Paso 1914, no writ).

<sup>62</sup> 121 Tex. 248, 49 S.W.2d 404 (1932).

<sup>63</sup> *Id.* TEX. REV. CIV. STAT. ANN. art. 7589a (1954). This statute made it unlawful to divert the natural flow of surface waters or to impound such waters in a manner as to damage the property of another.

<sup>64</sup> *Miller v. Letzerich*, 121 Tex. 248, 261, 49 S.W.2d 404, 411 (1932).

<sup>65</sup> *Id.* at 262, 49 S.W.2d at 411. There is a valid contention that this doctrine was never truly a part of the common law of England.

<sup>66</sup> *Id.* at 265, 49 S.W.2d at 413.

<sup>67</sup> *Id.* at 263, 49 S.W.2d at 412.

<sup>68</sup> *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404 (1932).

<sup>69</sup> *Texas State Board of Barber Examiners v. Beaumont Barber College, Inc.*, 454 S.W.2d 729 (Tex. Sup. 1970). The regulatory power of the legislature would be applicable in all areas in which the legislature is authorized to regulate.



exercise of sound discretion, is conclusive upon the courts.<sup>70</sup> In other words, legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold.<sup>71</sup>

A recent case which tested the constitutionality of divesting an appropriative right was *Texas Water Rights Commission v. Wright*.<sup>72</sup> The court found that a statute cancelling a water permit for ten years' non-use did not violate the constitutional rights of the permit holder.<sup>73</sup> One basis for this decision was the legislature's constitutional duty to conserve the state's water.<sup>74</sup> This is relevant to the statute presently under consideration. *Wright* held the ten years' non-use statute was enacted as a part of the preservation and conservation of the state's natural resources and therefore was a constitutional mandate to the legislature.<sup>75</sup> It is interesting to note that the court recognized *Wright's* matured appropriation to water as a vested right. However, this vested right to appropriated waters was defined as a right limited to beneficial and non-wasteful uses.<sup>76</sup>

That the Water Adjudication Act is a reasonable regulation of water rights is substantiated by the fact that it is essential to the development of our public water resources.<sup>77</sup> It has been said that the act will protect vested rights, and, at the same time, provide twenty-five per cent more water in the various rivers of the state for new use.<sup>78</sup> But can this regulation be extended to the point of completely divesting a riparian owner of his water use rights for failure to timely file a permit?<sup>79</sup>

It appears the regulatory section of the act considered here can *completely* extinguish a riparian right and still pass a constitutional test

<sup>70</sup> *Id.* at 732.

<sup>71</sup> *Smith v. Patterson*, 111 Tex. 535, 538, 242 S.W. 749, 750 (1922); *State v. Brownson*, 94 Tex. 436, 61 S.W. 114 (1901); *Lytle v. Haliff*, 75 Tex. 128, 132, 12 S.W. 610, 611 (1889).

<sup>72</sup> 464 S.W.2d 642 (Tex. Sup. 1971).

<sup>73</sup> TEX. WATER CODE § 5.173 (1971): "If no part of the water authorized to be appropriated under a permit or certified filing has been put to beneficial use at any time during the 10 year period immediately preceding the cancellation proceedings authorized by this sub-chapter, then the appropriation is presumed to have been wilfully abandoned, and the permit or certified filing is subject to cancellation in whole as provided by this sub-chapter."

<sup>74</sup> TEX. CONST. art. XVI § 59(a): "The conservation and development of all the natural resources of this state, including . . . the waters of its rivers and streams, for irrigation, power and all other useful purposes . . . are each and all hereby declared public rights and duties; . . ."

<sup>75</sup> *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 648 (Tex. Sup. 1971).

<sup>76</sup> *Id.* at 647. Compare with the following statutory definition of a water right: "A right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriated." TEX. WATER CODE § 5.025 (1971).

<sup>77</sup> Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas*, in TEX. BAR ASS'N LEGAL INSTITUTION ON WATER . . . AND THE NEW TEXAS LAW 38 (1968).

<sup>78</sup> *Id.* at 37.

<sup>79</sup> TEX. WATER CODE § 5.303(i) (1971).

if the court applies the rule stated in *Miller v. Letzerich*, which says there is no vested right in a prior court decision.<sup>80</sup> Even though this would probably be a correct position in law, it could be inequitable to a riparian owner, who, because of extenuating circumstances, had put little or no water to use during the prescribed period and is now barred from any use, other than domestic, of the water that flows by or through his land.<sup>81</sup> Would this be another situation in which equitable rights could be recognized?

In *State v. Hidalgo County Water Con. & Imp. Dist. No. Eighteen*,<sup>82</sup> the court, Justice Norvell sitting as special justice, recognized equitable water rights in riparian owners whose rights had been terminated by the decision in *Valmont Plantations*.<sup>83</sup> Justice Norvell came to the conclusion that, because of their great need and the state's recognition for many years of their rights, these riparian proprietors deserved equitable water rights.<sup>84</sup> This is the only Texas case that has recognized such rights.<sup>85</sup> Although there are no precedents, except *Hidalgo*, this certainly does not preclude the determination of such rights in another case.<sup>86</sup> It appears to be quite possible that such a path could be followed in alleviating any inequities caused by the enforcement of the Water Adjudication Act.

Even though this act presents a possibility of being inequitable to some individual riparian owners, it is now possible to define and delimit all water rights and to plan for the future needs of the State of Texas.<sup>87</sup> It is not likely the courts will find the act unconstitutional.<sup>88</sup>

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<sup>80</sup> *Miller v. Letzerich*, 121 Tex. 248, 263, 49 S.W.2d 404, 412 (1932).

<sup>81</sup> This could also apply to one who, for good reason, failed to file within the allotted time period. TEX. WATER CODE § 5.303(h) (1971).

<sup>82</sup> 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, no writ).

<sup>83</sup> *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 163 Tex. 381, 355 S.W.2d 502 (1962).

<sup>84</sup> *State v. Hidalgo Water Imp. Dist. No. 18*, 443 S.W.2d 728, 746 (Tex. Civ. App.—Corpus Christi 1969, no writ): "We are of the opinion that while such persons may not be entitled to a right of the same grade or class as those who have complied with the appropriation statutes or whose rights have been recognized by the state in some way, they are nevertheless entitled to consideration by a court of equity."

<sup>85</sup> *Id.* See Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas*, in TEX. BAR ASS'N LEGAL INSTITUTE ON WATER . . . AND THE NEW TEXAS LAW 36 (1968).

<sup>86</sup> *State v. Hidalgo Water Imp. Dist. No. 18*, 443 S.W.2d 728, 746 (Tex. Civ. App.—Corpus Christi 1969, no writ).

<sup>87</sup> Smith, *Recordation and Limitation of Non-Statutory Water Rights*, in TEX. BAR ASS'N LEGAL INSTITUTE ON WATER . . . AND THE NEW TEXAS LAW 2 (1968): "The dynamics of private enterprise and democratic institutions simply will not permit the existence as state policy of a concept so static, and so at war with progress."

<sup>88</sup> King, *Procedure for Adjudicating Water Rights*, in TEX. BAR ASS'N LEGAL INSTITUTE ON WATER . . . AND THE NEW TEXAS LAW 17 (1968).