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## Cancellation of Water Rights in Texas: Use it or Lose it.

R. Lambeth Townsend

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## CANCELLATION OF WATER RIGHTS IN TEXAS: USE IT OR LOSE IT

R. LAMBETH TOWNSEND\*

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### I. INTRODUCTION

It is beyond question that Texas' water resources are a vital ingredient in its vibrant and growing economy. The value of one's right to use the surface waters of this state is ever increasing. Anyone enjoying such a right should however beware—failure to exercise one's

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water right by beneficially using water can result in the loss of this valuable privilege.

It is the constitutional duty of the State of Texas, as well as its declared policy, to provide for the conservation and development of the state's water resources.<sup>1</sup> Texas has a comprehensive regulatory scheme to effectuate water conservation and the utilization of water resources through its system of granting and administering rights for the beneficial use of the state's water.<sup>2</sup> Matured appropriative water rights and riparian rights are vested rights that are limited to beneficial and non-wasteful uses of water.<sup>3</sup> Both appropriative rights and riparian rights are usufructuary rights to the use of the state's water as the state is at all times the owner of the corpus of the water.<sup>4</sup> Neither an appropriator nor a riparian is entitled to continuous non-use of water because nonuse of the state's water is wasteful.<sup>5</sup>

The Texas Water Commission is the state agency given primary responsibility for implementing the constitutional and statutory provisions relating to water.<sup>6</sup> Before the Commission can grant an application to appropriate water, it must find that unappropriated water is available in the source of supply.<sup>7</sup> In *Lower Colorado River Authority*

1. See *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971); *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 682 (Tex. Civ. App.—Austin 1947, no writ); TEX. CONST. art. XVI, § 59(a); TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986).

2. See TEX. WATER CODE ANN. §§ 11.001 to -.409 (Vernon Supp. 1986).

3. See *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444-45 (Tex. 1982); *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971); TEX. WATER CODE ANN. § 11.025 (Vernon Supp. 1986).

4. See *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444-45 (Tex. 1982). In *Upper Guadalupe* the supreme court held that riparians whose land grants were acquired before July 1, 1985, have vested rights to the use of non-flood waters but such right is an usufructuary right subject to the Water Rights Adjudication Act. See *id.* at 444-45. Being subject to adjudication, riparian rights are subject to being limited to the maximum amount of water actually beneficially used during any one of the five years between 1963 and 1967. See TEX. WATER CODE ANN. § 11.303(b) (Vernon Supp. 1986); see also *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971).

5. See *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 445 (Tex. 1982) (riparian right does not include right to nonuse); *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971) (permittes at no time were vested with right of nonuse of water for indefinite period of time).

6. See TEX. WATER CODE ANN. § 5.012 (Vernon Supp. 1986).

7. See *id.* § 11.134. The statute provides:

(a) After the hearing, the commission shall make a written decision granting or denying the application. The application may be granted or denied in whole or in part.

*v. Texas Department of Water Resources*,<sup>8</sup> the Texas Supreme Court held that unappropriated water means “the amount of water remaining after taking into account all existing uncanceled permits and filings valued at their recorded levels.”<sup>9</sup> In response to arguments that considering permits and certified filing at face value will allow waste of the unused water, the court concluded that the state’s power to cancel water rights was the answer since “[n]o person is granted the right to waste water by not using it.”<sup>10</sup>

Cancellation of unused water rights enables the Water Commission to make water available for beneficial use by others. Only by the beneficial use of water can the state obtain the maximum benefit from this precious resource and prevent its waste. Texas has three types of cancellations. First, failure to diligently complete a project for taking or storing water can result in forfeiture and cancellation.<sup>11</sup> Second, a right to use the state’s water is forfeited if willfully abandoned for three successive years.<sup>12</sup> Third, a water right is subject to cancellation in whole or in part for ten consecutive years of non-beneficial use.<sup>13</sup>

As the availability of water becomes more limited, the Water Commission will be forced to use the cancellation provisions as a tool in the management and administration of water rights. Private interests may find cancellation to be an available remedy in water rights disputes. This article reviews and analyzes the cancellation provisions in the Texas Water Code with an emphasis on the forfeiture provisions<sup>14</sup> as distinguished from the abandonment provision.<sup>15</sup> Although aban-

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(b) The commission shall grant the application only if:

- (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
- (2) unappropriated water is available in the source of supply; and
- (3) the proposed appropriation;
  - (A) contemplates the application of water to any beneficial use;
  - (B) does not impair existing water rights or vested riparian rights; and
  - (C) is not detrimental to the public welfare.

*Id.* § 11.134.

8. 689 S.W.2d 873 (Tex. 1984).

9. *See id.* at 874.

10. *See id.* at 882.

11. *See* TEX. WATER CODE ANN. § 11.146(b) (Vernon Supp. 1986).

12. *See id.* § 11.030.

13. *See id.* §§ 11.173, -.178.

14. *See id.* §§ 11.146, -.173 & -.178. Forfeiture under these provisions is not the same as common law forfeiture. Statutory forfeiture is the loss of a water right from nonuse throughout a period of time prescribed by statute.

15. *See id.* § 11.030.

donment<sup>16</sup> and forfeiture are fundamental to western water law, the scope of this article is limited to Texas' cancellation statutes and cases.<sup>17</sup>

## II. HISTORICAL DEVELOPMENT OF CANCELLATION STATUTES

Until recently, Texas water law has been very confused as a result of Texas' dual system of water rights. Texas recognized both common law riparian rights and the law of water appropriation as enacted by the Texas Legislature. In the early days of the Republic of Texas, the law of Mexico at the time of Texas' independence was applicable. Mexican law provided that water could not be used for any purpose other than domestic or livestock purposes without a grant from the sovereign.<sup>18</sup> In 1840 the Republic of Texas adopted the common law of England insofar as it was incorporated in the new Constitution and the statutes.<sup>19</sup> Riparian rights were recognized judicially in 1856.<sup>20</sup> The riparian system continued to develop judicially while the legislature treated the ordinary flow of rivers as water that the state could legislatively appropriate.<sup>21</sup>

### A. *Irrigation Act of 1889*

Motivated by a severe drought beginning in 1883, the legislature

16. For an exhaustive treatment of the law of abandonment and forfeiture in the western states, see W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 255-328 (1974).

17. Cancellation as used in this article means loss of water rights by statutory forfeiture or abandonment as provided in the Texas Water Code.

18. See *In re Adjudication of the Water Rights in the Medina River Watershed*, 670 S.W.2d 250, 254 (Tex. 1984) (Mexican grant of land did not include right to appropriate water from a nonperennial stream crossing the land); *Valmont Plantations v. State*, 346 S.W.2d 853, 857 (Tex. Civ. App.—San Antonio 1961) (Spanish and Mexican grants of land abutting rivers did not grant right to use water), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962).

19. See Act of January 20, 1840, § 1, 1840 Tex. Gen. Laws 4, 2 H. GAMMEL, *LAWS OF TEXAS* 177 (1878); SAYLES, *EARLY LAWS OF TEXAS* art. 707, § 1 (carried forward and found as TEX. REV. CIV. STAT. ANN. art. 1 (Vernon 1969)).

20. See *Haas v. Choussard*, 17 Tex. 588, 590 (1856).

21. See Walker, *Legal History of the Riparian Right of Irrigation in Texas Since 1836*, PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS 41, 46-47 (1959). Between 1856 and 1879, eight special acts of the legislature concerned the use of water for irrigation purposes. The special acts authorized the construction of dams to store water for irrigation and contained express grants of water for that purpose. It is not apparent from the acts whether beneficiaries of the special acts owned any riparian land. The acts, however, contemplated the sale of the water for irrigation purposes without any restriction on the location of the purchaser's land.

enacted the Irrigation Act of 1889,<sup>22</sup> which was the first step in Texas' journey into the appropriative system of water rights. The 1889 Act declared that the unappropriated waters of every river or natural stream within the arid portions of the state to be property of the public and provided that such unappropriated waters may be acquired by appropriation only for irrigation, domestic, and other beneficial uses.<sup>23</sup> Such appropriation could not deprive a riparian landowner the use of water for domestic use.<sup>24</sup> One intending to appropriate water under this Act was required to file with the county clerk a sworn statement describing the ditch or canal, its carrying capacity, and stream from which the water was to be taken.

An appropriation under the Act was limited to one of the named purposes.<sup>25</sup> The right ceased when an appropriator ceased using the water for such purposes.<sup>26</sup> Failure to file a sworn statement, however, would not prevent a claimant from establishing an appropriative right in the courts.<sup>27</sup>

Although nonuse would cause the loss of water rights acquired under the Act, there was no procedure for a formal cancellation of the right. This loss provision was available to private parties in water rights disputes. It was presumed that a party relying on this provision would have the burden of proving that the appropriator had abandoned the water right because no term of years was associated with loss by nonuse<sup>28</sup> and because forfeitures are not favored by the courts.<sup>29</sup>

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22. See Irrigation Act of 1889, ch. 88, 1889 Tex. Gen. Laws 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898).

23. See *id.* §§ 1, 2.

24. See *id.* § 1.

25. See *id.* § 10. The authorized purposes were irrigation, domestic, mining, milling, and stockraising. See *id.* § 10.

26. See *id.* § 3. Even though the right ceased with nonuse, the statute did not specify any period of nonuse.

27. See *id.* § 8.

28. Abandonment is the voluntary relinquishment of possession or cessation of use coupled with the intent to give up or desert. See *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); see also W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 425 (1961) (statutory forfeiture is loss of water rights by failure to exercise right throughout specific period of time prescribed by statute).

29. See *C.G. Murphy Co. v. Lack*, 404 S.W.2d 853, 856 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.).

### B. *Irrigation Act of 1895*

In 1895 the legislature enacted an Irrigation Act that repealed the 1889 Act and declared that storm and rain waters were the property of the state, in addition to the unappropriated waters of the ordinary flow and underflow of every running river or natural stream.<sup>30</sup> Like the previous appropriation act, the 1895 Act was applicable only to arid portions of the state in which irrigation was beneficial for agricultural purposes.<sup>31</sup> An appropriation under the 1895 Act was limited to irrigation, mining, milling, the construction of waterworks for cities and towns, or stockraising.<sup>32</sup> Furthermore, an appropriation pursuant to the Act could not prejudice the rights of a riparian owner.<sup>33</sup> In most respects, the 1895 Act was very similar to the earlier act. The 1895 Act, however, did not contain an express provision for the loss of an appropriative right for nonuse of water.

The sworn affidavits filed with the county clerks required by the Acts of 1889 and 1895 became known as certified filings.<sup>34</sup> Appropriators' claims under these acts were limited only in two respects. First, the water could be used only for the purposes stated in the acts.<sup>35</sup> Second, construction on the water project contemplated by the filing had to be started within ninety days after the filing and completed diligently.<sup>36</sup> The lack of restrictions resulted in paper appropriations far in excess of the actual water available and of actual appropriation by beneficial use of water.<sup>37</sup>

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30. See Irrigation Act of 1895, ch. 21, 1895 Tex. Gen. Laws 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898).

31. See *id.* §§ 1, 4.

32. See *id.* § 2.

33. See *id.* § 3.

34. See *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 440 (Tex. 1982); *City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357, 362 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); Irrigation Act of 1913, ch. 171, §§ 12-14, 1913 Tex. Gen. Laws 358, 360-61.

35. See Irrigation Act of 1895, ch. 21, §§ 3-4, 1895 Tex. Gen. Laws 21, 22, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898).

36. See Irrigation Act of 1889, ch. 88, §§ 6-7, 1889 Tex. Gen. Laws 100, 9 H. GAMMEL, LAWS OF TEXAS 1129 (1898); Irrigation Act of 1895, ch. 21, §§ 8-9, 1895 Tex. Gen. Laws 21, 10 H. GAMMEL, LAWS OF TEXAS 752-53 (1898).

37. See Rollins, *The Need for a Water Inventory in Texas*, PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS 67, 68 (1952).

### C. Irrigation Act of 1913

In 1913 the legislature enacted an Irrigation Act that was applicable to the entire state and that provided for a comprehensive regulatory system for appropriative water rights.<sup>38</sup> The Irrigation Act of 1913 declared all unappropriated waters to be the property of the state,<sup>39</sup> but at the same time provided that the ordinary flow and underflow could not be diverted to prejudice riparian rights.<sup>40</sup> The authorized purposes of the 1913 Act were expanded to include manufacturing and the development of power in addition to irrigation, mining, milling, municipal uses, and stockraising.<sup>41</sup> In addition, the 1913 Act created the Board of Water Engineers as the state agency for the administration and management of the state's water.<sup>42</sup>

All of those who filed sworn statements with the county clerk were required to file a certified copy of the sworn statement with the Board.<sup>43</sup> Anyone desiring to acquire the right to appropriate state water after the Act took effect was required to file an application with the Board for a permit to make the desired appropriation.<sup>44</sup> The Board could grant a permit only if unappropriated water was available in the water source.<sup>45</sup> Further, the water right acquired under the 1913 Act was limited to the amount necessarily required for the authorized purposes.<sup>46</sup>

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38. See Irrigation Act of 1913, ch. 171, 1913 Tex. Gen. Laws 358.

39. See *id.* § 1. The section provided:

The unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays, or arms of the Gulf of Mexico, collections of still water, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, the title to which has not already passed from the State, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided.

*Id.* § 1.

40. See *id.* § 3.

41. See *id.* § 4.

42. See *id.* § 7.

43. See *id.* § 14.

44. See *id.* § 15.

45. See *id.* § 19.

46. See *id.* §§ 47, 48. Section 48 provided:

Rights to the use of water acquired under the provisions of this Act, shall be limited and restricted to so much thereof as may be necessarily required for the purposes stated in this Act irrespective of the carrying capacity of the ditch, and all the water not so applied shall not be considered as appropriated.

*Id.* § 48.



The origins of two of the present cancellation statutes were contained in the 1913 Act. First, an appropriator was required to begin actual construction of the project within ninety days of the issuance of a permit and to continue the construction diligently to completion.<sup>47</sup> Failure to do either could result in the cancellation of the permit in whole or in part.<sup>48</sup> Second, the Act provided for the forfeiture of any appropriation willfully abandoned during any three successive years.<sup>49</sup> This provision applied to certified filing as well as permits granted under the 1913 Act.<sup>50</sup>

#### D. *Irrigation Act of 1917*

In 1917 Texas adopted the "Conservation Amendment" that constitutionally mandated the conservation and development of the state's water resources.<sup>51</sup> In the same year the legislature enacted the Irrigation Act of 1917.<sup>52</sup> This Act revised the previous irrigation acts and provided for the adjudication of conflicting water rights by the Board of Engineers.<sup>53</sup> The 1917 Act continued the permit provisions<sup>54</sup> and attempted to bring the prior system of certified filings into harmony with permits for effective management and administration by the Board through the adjudication process. The adjudication provisions, however, were soon held to violate constitutional separation of powers provisions by conferring judicial powers upon an administrative agency.<sup>55</sup>

47. *See id.* § 38.

48. *See id.* § 38.

49. *See id.* § 49.

50. *See id.* § 49.

51. *See* TEX. CONST. art. XVI, § 59. Section 59 provides in part:

(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 waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the 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.

*Id.* § 59.

52. *See* Irrigation Act of 1917, ch. 88, 1917 Tex. Gen. Laws 211.

53. *See id.* §§ 1 *et seq.*

54. *See id.* §§ 15-21.

55. *See* Board of Water Engineers v. McKnight, 111 Tex. 82, 92-93, 229 S.W. 301, 309 (1921).

The 1917 Act retained the requirements that actual construction of a permitted project must begin within ninety days, and that once begun, construction was to continue diligently until completion.<sup>56</sup> Failure to do either subjected the appropriation to cancellation in whole or in part.<sup>57</sup> The abandonment provision was retained as well.<sup>58</sup>

The cancellation provisions contained in the 1917 Act are substantially the same today. The only difference between the present and previous abandonment statute is the language resulting from the codification of the water statutes in 1971. The 1917 forfeiture provisions concerning failure to begin construction or failure to diligently complete have been modified in two instances.<sup>59</sup> In 1920 the legislature enacted statutes providing that construction of a storage reservoir must begin within a time fixed by the Board not to exceed two years and that such time limit could be extended by the Board.<sup>60</sup> In 1981 the time limit within which construction on direct diversion projects must start was similarly changed to "a time fixed by the Board not to exceed two years."<sup>61</sup> The agency also was given authority to extend the time for beginning construction.<sup>62</sup>

#### E. *Forfeiture for Nonuse*

In 1953 the Texas Legislature enacted a statute that for the first time provided for the cancellation of permits and certified filings for ten consecutive years of nonuse.<sup>63</sup> The statute applied only to appropriations granted by, or filed with, the Board for more than ten years *prior* to the effective date and under which no part of the water authorized had been used for a ten year period.<sup>64</sup> Such appropriations were declared to be cancelled and of no further force and effect. The effectiveness date of the act was January 1, 1955, one and a half years after the date of enactment.<sup>65</sup> The 1953 Act was expressly made inapplicable to riparian rights.<sup>66</sup>

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56. See Irrigation Act of 1917, ch. 88, § 33, 1917 Tex. Gen. Laws 211, 219.

57. See *id.* § 33.

58. See *id.* § 46.

59. See *id.* §§ 7, 33.

60. See Act of June 18, 1920, ch. 46, § 2, 1920 Tex. Gen. Laws 87.

61. See Act of June 17, 1981, ch. 828, § 3, 1981 Tex. Gen. Laws 3155.

62. See *id.* § 3.

63. See Act of June 8, 1953, ch. 352, 1953 Tex. Gen. Laws 867.

64. See *id.* § 1.

65. See *id.* § 4.

66. See *id.* § 3.

Two years after the 1953 Act became effective, the legislature amended that legislation to provide for a more comprehensive forfeiture statute.<sup>67</sup> Without specifically excluding riparian rights, the statute applied to permits and certified filings. Unlike the previous statute, the 1957 Act provided for partial cancellation in addition to total cancellation.<sup>68</sup> The statute gave the Board the duty to institute a cancellation hearing if it found that its records indicated ten consecutive years of nonuse. If the Board found after hearing that no water had been beneficially used for the purposes authorized during the 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."<sup>69</sup>

The Texas Supreme Court found the 1957 Act to be constitutional in *Texas Water Rights Commission v. Wright*.<sup>70</sup> Noting that the language of the statute appeared to confuse the concept of abandonment with that of forfeiture, the court found that the intent of the legislature was to provide for a cancellation procedure to terminate water permits upon proof that no beneficial use had been made of the water for a ten-year period.<sup>71</sup> Although appropriative rights, when acquired and perfected, are vested rights to use the state waters, an appropriator does not acquire the right of nonuse of the water. Inherently attached to an appropriative right is the duty that the appropriator will beneficially use the water.<sup>72</sup> The court held that water permits were "grants of usufructuary rights to the state's water upon the implied condition subsequent that water would be beneficially used."<sup>73</sup> Although it had retroactive effects, the statute was constitutional because it was a reasonable measure to ensure the enforcement of the condition subsequent, after fair opportunity to defend the right.<sup>74</sup>

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67. See Act of April 1, 1957, ch. 39, 1957 Tex. Gen. Laws 82.

68. See *id.* § 1.

69. *Id.* § 1.

70. 464 S.W.2d 642 (Tex. 1971).

71. See *id.* at 646. The court went on to say that the presumption provided in the statute was a conclusive rather than a rebuttable one, and that intent was not an element contemplated by the legislature. See *id.* at 646.

72. See *id.* at 648.

73. See *id.* at 649.

74. See *id.* at 649. In finding the statute to be constitutionally permissible, the court concluded that a permittee would "reasonably expect that its rights would be subject to a remedy enforcing the conditions inherently attached to those rights." *Id.* at 649. If the state had no such remedy, the state would not be able to "assert and protect its own rights and interests in the water." *Id.* at 649.

F. *Water Rights Adjudication Act of 1967*

Texas' dual system of water rights, appropriative and riparian, continued from its inception until 1967 with the passage of the Water Rights Adjudication Act.<sup>75</sup> The Adjudication Act required all claims of water rights, except permits and certified filings, to be filed with the Texas Water Commission by September 1, 1969,<sup>76</sup> and authorized the adjudication of all water rights.<sup>77</sup> During the period of the dual system, Texas courts modified the riparian doctrine to allow irrigation<sup>78</sup> and ruled that riparian rights attach only to the ordinary flow, as opposed to the flood flow, in an attempt to reconcile the two systems.<sup>79</sup> This attempt failed.<sup>80</sup> The constitutionality of the Adjudication Act as applied to riparian rights was upheld by the Texas Supreme Court in 1980.<sup>81</sup> The court held that "the termination of the riparians' con-

75. Water Rights Adjudication Act, ch. 45, 1967 Tex. Gen. Laws 45, *codified as* TEX. WATER CODE ANN. §§ 11.301 to -341 (Vernon Supp. 1986).

76. *See* TEX. WATER CODE ANN. § 11.303(c) (Vernon Supp. 1986).

77. *See id.* § 11.304.

78. *See* *Watkins Land Co. v. Clements*, 98 Tex. 578, 581, 86 S.W. 733, 735 (1905). *But see In re* Water Rights of Cibolo Creek Watershed of San Antonio River Basin, 568 S.W.2d 155, 158 (Tex. Civ. App.—San Antonio 1978, no writ) (neither original Spanish or Mexican land grant nor long use of water entitles holder to vested equitable right to use creek for irrigation purposes).

79. *See* *Motl v. Boyd*, 116 Tex. 82, 96, 286 S.W.2d 458, 468 (1926); *accord* *El Paso County Water Control & Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 909 (W.D. Tex. 1955) (when waters of stream rise above highest normal flow, they become "flood waters" and ordinary riparian rights do not attach), *aff'd in part & rev'd in part*, 243 F.2d 927 (5th Cir.), *cert. denied*, 355 U.S. 820 (1957).

80. *See* *Martinez v. Maverick County Water Control & Improvement Dist. No. 1*, 219 F.2d 666, 670 (5th Cir. 1955). When faced with a suit to adjudicate water rights on the Rio Grande, a federal judge exercised his discretion and refused the suit commenting:

I feel that, under all circumstances of the record and matters of which I may take judicial knowledge, I should decline the invitation of counsel for plaintiffs to 'accept the challenge presented in this case, that is, to help solve the problem of water rights which it looks like the legislature of Texas cannot solve. . . .'

. . . The Texas laws and decisions are in hopeless confusion; . . . their application and administration would be difficult . . . ; said laws confer little, if any, real authority upon the State Board of Engineers; that the Board has granted permits on many streams . . . very few of which have been cancelled, in such numbers and for such quantities that if riparian rights are given the full effect for which plaintiffs contend, practically every drop of water, normal flow or flood, is 'bespoken' . . . [that is] particularly true in the Rio Grande Valley. . . .

*Id.* at 670.

81. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 442-44 (Tex. 1982).

tinuous non-use (sic) of water is not a taking of their property."<sup>82</sup> In other words, the riparian right is the right to beneficially use water, not waste it by nonuse.<sup>83</sup>

### III. PRESENT CANCELLATION PROVISIONS

In 1971 the legislature adopted a codification of all of the general and permanent water statutes.<sup>84</sup> The Water Code was amended in 1977<sup>85</sup> and 1985<sup>86</sup> to facilitate reorganization of the state agencies administering the water laws. The purpose of the codification was to rearrange the water statutes, eliminate unnecessary provisions, and restate the law in modern American English.<sup>87</sup>

Under the present Code, water rights become subject to cancellation for failure to diligently complete a water project,<sup>88</sup> willful abandonment for three successive years,<sup>89</sup> or ten consecutive years of nonuse.<sup>90</sup> All three provisions are based on the premise that to retain the right to use the state's water, an appropriator must beneficially use water and not waste it. Nonuse of water is waste.

#### A. *Cancellation for Inaction or Failure to Diligently Develop*

A person may not appropriate state water or begin construction of any facility designed for the diversion, storage, or taking of water without initially obtaining a permit from the Texas Water Commis-

82. *Id.* at 444.

83. *See id.* at 445.

84. *See* TEX. WATER CODE ANN. ch. 58, 1971 Tex. Gen. Laws 110, *as amended by* ch. 84, 1971 Tex. Gen. Laws 774 *and* ch. 612, 1971 Gen. Laws 1974. The Code included statutes relating to water rights, water development, water quality control, river compacts, and general law districts. Local and special laws, such as statutes creating various kinds of conservation and reclamation districts, were not included in the Water Code. The Water Code, however, did not affect the local and special laws.

85. *See* Department of Water Resources Act, ch. 870, 1977 Tex. Gen. Law Serv. 2207, *codified at* TEX. WATER CODE ANN. §§ 5.001 *et seq.* (Vernon Supp. 1986). The Texas Department of Water Resources was created by combining the Texas Water Rights Commission, Texas Water Quality Board, and the Texas Water Development Board into one state agency.

86. *See* Texas Water Commission Reorganization Act, ch. 795, 1985 Tex. Sess. Law Serv. 5743 (Vernon). During sunset review, the Texas Department of Water Resources was reorganized and split into the Texas Water Commission and the Texas Water Development Board. The Texas Water Commission has jurisdiction of water rights as well as other related matters. *See* TEX. WATER CODE ANN. § 5.261 (Vernon Supp. 1986).

87. *See* TEX. WATER CODE ANN. § 1.001 (Vernon 1972).

88. *See id.* § 11.146 (Vernon Supp. 1986).

89. *See id.* § 11.030.

90. *See id.* §§ 11.171 to -.186.

sion to make the appropriation.<sup>91</sup> A permit may be granted after application if unappropriated water is available and if the proposed appropriation does not impair existing water rights.<sup>92</sup> The issuance of a permit gives the holder an inchoate right to appropriate water. Such right becomes a vested water right when perfected by beneficial use of the water appropriated by the permit.<sup>93</sup>

One of the necessary steps in the path to perfection is the construction of the facilities for the storage, taking, or diversion of the water. The permit from the Water Commission must state the time within which construction or work on such facility must begin and must be completed.<sup>94</sup> Once construction has begun, the appropriator must work diligently and continuously to completion of the project.<sup>95</sup> The initial time period fixed by the commission to begin and complete construction cannot exceed two years.<sup>96</sup> The commission, however, may extend the time for beginning and completing construction.<sup>97</sup>

If a permittee fails to begin the construction within the time provided in the permit or the extension, the permittee forfeits all rights under the permit.<sup>98</sup> The appropriator is, however, entitled to notice and hearing before the commission cancels an appropriation for failure to begin construction. Based on the statutory language, it is apparent that the intention of the permittee or justification for inaction

91. *See id.* § 11.121; *see also* *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1947, no writ) (state board has continuing power to determine, in its discretion, whether appropriative uses sought in applications meet statutory objectives). A person may, however, construct on his own property a dam to store no more than 200 acre-feet of water for domestic and livestock purposes. *See* TEX. WATER CODE ANN. § 11.142 (Vernon Supp. 1986).

92. *See* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986). Further, the appropriation request must be in no way detrimental to the public welfare. *See id.* § 11.134(3)(c).

93. *See id.* §§ 11.025, -.026; *see also* *Lower Colorado River Auth. v. Texas Dep't of Water Resources*, 638 S.W.2d 557, 563 (Tex. App.—Austin 1982) (all water not beneficially used never considered appropriated for purposes of statute), *rev'd on other grounds*, 689 S.W.2d 873 (Tex. 1984). *See generally* Note, *Water Permits: Vested Rights Limited to Beneficial Use of Water*, 3 ST. MARY'S L.J. 136, 143 (1971) (briefly explores development of beneficial use requirement to obtain vested rights). These provisions also apply to certified filings. *See Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1947, no writ).

94. *See* TEX. WATER CODE ANN. § 11.135(b)(7) (Vernon Supp. 1986).

95. *See id.* § 11.145(a).

96. *See id.* § 11.145(a).

97. *See id.* § 11.145(a).

98. *See id.* § 11.146(b).

are not defenses in a cancellation proceeding for inaction.<sup>99</sup>

To cancel a permit or certified filing once construction has begun, the commission must find that the appropriator has failed to work with reasonable diligence toward completion of the facility.<sup>100</sup> Whether an appropriator has worked with reasonable diligence will be a fact issue for the commission to decide.<sup>101</sup> The appropriator's intentions as well as the justification for failure to complete the project should be relevant in determining whether reasonable diligence has been exercised.

### B. *Willful Abandonment*

If an appropriation is willfully abandoned for three successive years, the right to use the water is forfeited and the water is again subject to appropriation.<sup>102</sup> This provision has been in Texas water statutes since 1913.<sup>103</sup> Although available for seven decades, the abandonment provision has not been used extensively by the commission to cancel water rights. The only reported cases involving willful abandonment of water rights have been suits between appropriators.<sup>104</sup>

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99. *Cf.* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 646 (Tex. 1971) (justification and diligence immaterial in cancellation proceeding based upon total nonuse).

100. *See* TEX. WATER CODE ANN. §§ 11.146(b), (f) (Vernon Supp. 1986).

101. *See id.* §§ 11.146(b), (f).

102. *See id.* § 11.030.

103. *See* Irrigation Act of 1913, ch. 171, § 49, 1913 Tex. Gen. Laws 370. Before codification, the willful abandonment statute provided:

Any appropriation or use of water heretofore made under any statute of this state or hereafter made under the provisions of this Act 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.

*Id.* § 49; *see also* Irrigation Act of 1917, ch. 88, § 46, 1917 Tex. Gen. Laws 222 (providing for same rule).

104. In 1924, the Austin Court of Appeals held that the statutes authorizing the Board of Water Engineers to cancel certified filings and permits for failure to complete a water project once construction commenced, and those for willful abandonment were unconstitutional since such action was judicial in nature and would violate the separation of powers provision of the constitution. *See Fairbanks v. Hidalgo County Water Control & Improvement Dist. No. 2*, 261 S.W.2d 542, 547 (Tex. Civ. App.—Austin 1924, writ dismissed). The *Fairbanks* court relied upon an earlier Texas Supreme Court decision finding that the 1917 Adjudication Act was in violation of the separation of powers doctrine as it conferred judicial powers upon an administrative agency. *See Board of Water Engineers v. McKnight*, 111 Tex. 82, 86, 229 S.W. 301, 304 (1921). About twenty years after *Fairbanks* was decided, the Texas Supreme Court considered the constitutionality of a statute authorizing the Railroad Commission to adjust the correlative rights of owners of gas in a common reservoir. *See Corzelius v. Harrell*, 143 Tex.

Abandonment is the voluntary relinquishment of the right by the owner with the intention to desert it.<sup>105</sup> Intention to abandon is an essential element of abandonment and must be shown by clear and satisfactory evidence.<sup>106</sup> Abandonment is a question of fact; therefore, nonuse is not sufficient in itself to show abandonment.<sup>107</sup> Because of the difficulty of proving willful abandonment, it is very unlikely that the state in the future will attempt to cancel water rights for willful abandonment even though the time period is relatively short.

### C. Cancellation for Ten Years of Nonuse

Under current law, a permit, certified filing, or certificate of adjudication can be cancelled in whole or in part for ten consecutive years of nonuse.<sup>108</sup> As originally enacted, the cancellation for nonuse provi-

509, 186 S.W.2d 961 (1945). The specific attack on the statute was that it violated separation of powers and conferred judicial powers upon an administrative agency. The statute under consideration allowed the administrative decision to become final if not appealed. Based upon article XVI, section 59, the Conservation Amendment to the Texas Constitution, the court held that no violation of the separation of powers was involved. *See id.* at 514, 186 S.W.2d at 964. The court further ruled that no judicial powers were conferred upon the administrative agency. *See id.* at 518, 186 S.W.2d at 967.

The court distinguished the *McKnight* decision and found it inapplicable because *McKnight* was construing the constitution before the Conservation Amendment was adopted. *See id.* at 514, 186 S.W.2d at 964. The adjudication provisions of the 1917 Irrigation Act were enacted before the Conservation Amendment was adopted. The *Fairbanks* decision is distinguishable on the same grounds and should not be controlling today.

For other abandonment cases involving disputes between appropriators, see *City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *Lower Nueces River Water Supply Dist. v. Cartwright*, 274 S.W.2d 199 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.); *City of Anson v. Arnett*, 250 S.W.2d 450 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

105. *See Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 646 (Tex. 1971); *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

106. *See City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357, 376-77 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *Lower Nueces River Water Supply Dist. v. Cartwright*, 274 S.W.2d 199, 208 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.); *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

107. *See City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357, 376 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *cf. State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728, 759 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.); *State Board of Water Engineers v. Slaughter*, 382 S.W.2d 111, 116 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.); *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

108. *See TEX. WATER CODE ANN.* §§ 11.172, -.173, -.178 (Vernon Supp. 1986). Section 11.172, entitled a "General Principle" provides that "[A] permit, certified filing, or certificate



sions applied only to permits and certified filings, but in 1975 the legislature made certificates of adjudication subject to the cancellation provisions.<sup>109</sup> Riparian rights and other claims of water rights will be evidenced by certificates of adjudication once the water rights adjudication process is concluded. Consequently, *all* water rights in Texas are subject to total or partial cancellation if water is not beneficially used for ten consecutive years.

### 1. Total Cancellation

If no part of the water authorized to be appropriated has been beneficially used at any time during ten consecutive years, the appropriation is subject to total cancellation.<sup>110</sup> The commission has the duty to initiate cancellation proceedings if its records do not show any beneficial use of water under a permit, certified filing, or a certificate of adjudication for ten years.<sup>111</sup> Once again, notice and hearing must be given to the owner of the appropriation before cancellation.<sup>112</sup> At this hearing the appropriator must be given an opportunity to bring forth

of adjudication is subject to cancellation in whole or part for 10 years nonuse as provided by this subchapter." Section 11.173, dealing with cancellation in whole, reads:

If no part of the water authorized to be appropriated under a permit, certified filing, or certificate of adjudication has been put to beneficial use at any time during the 10-year period immediately preceding the cancellation proceedings authorized by this subchapter, then the appropriation is presumed to have been willfully abandoned, and the permit, certified filing, or certificate of adjudication is subject to cancellation in whole as provided by this subchapter.

*Id.* § 11.173.

Section 11.178, on the other hand, deals with partial cancellations and provides that:

If some part of the water authorized to be appropriated under a permit, certified filing, or certificate of adjudication has not been put to beneficial use at any time during the 10-year period immediately preceding the cancellation proceedings authorized by this subchapter, then the permit, certified filing, or certificate of adjudication is subject to partial cancellation, as provided by this subchapter, to the extent of the 10 years nonuse.

*Id.* § 11.178

109. *See* Act of March 27, 1975, ch. 27, § 1, 1975 Tex. Gen. Laws 49.

110. *See* TEX. WATER CODE ANN. § 11.173 (Vernon Supp. 1986).

111. *See id.* § 11.174.

112. *See id.* §§ 11.175, -176. Section 11.175, which deals with the proper notice to be given, requires in part:

(a) At least 30 days before the date of the hearing, the commission shall send notice of the hearing to the holder of the permit, certified filing, or certificate of adjudication being considered for cancellation. Notice shall be sent by certified mail, return receipt requested, to the last address shown by the records of the commission. The commission shall also send notice by regular mail to all other holders of permits, certified filings, certificates of adjudication, and claims of water rights.

*Id.* § 11.175.

evidence that the water in question has been beneficially used for the purposes authorized by the permit, filing, or certificate during the ten year period.<sup>113</sup> However, the appropriator's intentions or justification for nonuse are not available as defenses if no water has been beneficially used.<sup>114</sup> The commission must cancel the appropriation if it finds that no water has been beneficially used for an authorized purpose during the statutory period.<sup>115</sup>

The total cancellation provisions as applied to permits and filings were upheld by the Texas Supreme Court in *Texas Water Rights Commission v. Wright*.<sup>116</sup> The court's decision, however, was before the 1977 amendment adding certificates of adjudication. Because the court has held that riparian rights are subject to the water right adjudication provisions,<sup>117</sup> it can be presumed that the cancellation provisions as applied to certificates will withstand challenge as well. The presumption is not unfounded because the purpose of both the adjudication and the cancellation provisions is to prevent waste, through nonuse, of the state's water resources.

## 2. Partial Cancellation

An appropriation is also subject to partial cancellation if a portion of the water authorized to be appropriated has not been beneficially used during ten consecutive years.<sup>118</sup> When the commission's records show that a portion of the water authorized has not been beneficially used during a ten year period, the commission *may* initiate proceedings to partially cancel the appropriation.<sup>119</sup> In contrast, the commission is *required* to initiate a cancellation proceeding when its records show total nonuse.<sup>120</sup> Notice and a hearing are also required before any partial cancellation can occur.<sup>121</sup>

An appropriator has certain statutory defensive safeguards in a pro-

113. *See id.* § 11.176.

114. *See Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 646 (Tex. 1971).

115. *See* TEX. WATER CODE ANN. § 11.177 (Vernon Supp. 1986).

116. 464 S.W.2d 642 (Tex. 1971).

117. *In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438 (Tex. 1982) (riparian rights were subject to Adjudication Act because riparian did not have right to nonuse).

118. *See* TEX. WATER CODE ANN. § 11.178 (Vernon Supp. 1986).

119. *See id.* § 11.179.

120. *See id.* § 11.174.

121. *See id.* §§ 11.180, -.181. Section 11.181 provides that "[t]he commission shall hold a hearing and shall give the holder of the permit, certified filing, or certificate of adjudication and

ceeding for partial cancellation. Under section 11.182 of the Water Code, before the commission can cancel an appropriation in part, the commission must find: (1) that any part of the water granted or authorized has not been used beneficially during the ten year period;<sup>122</sup> (2) that the appropriator has failed to use reasonable diligence in applying the unused portion of the water to an authorized beneficial use;<sup>123</sup> and (3) that the appropriator has no justification in the nonuse or has no bona fide intention of making an authorized beneficial use of the unused water within a reasonable time.<sup>124</sup> The commission must also consider the financial investment made and the amount of time usually necessary for diligent development in making its determination about the intentions of the appropriator to beneficially use the water in a reasonable time.<sup>125</sup> Further, the commission is required to consider the authorized use of the water and the priority of that use before any decision can be made.<sup>126</sup>

### 3. General Provisions

Certain types of appropriations are protected from cancellation. No portion of a certified filing held by a municipality or a municipal water district may be cancelled if water authorized by the filing has been used for municipal purposes at any time during the ten year period.<sup>127</sup> The commission also may allow an appropriator with a water storage facility to retain the impoundment to the limit of the storage capacity authorized for livestock, domestic, or recreational purposes.<sup>128</sup>

In addition, the state and other interested parties are protected against the agency's failure to initiate cancellation proceedings. First, agency inaction does not validate or improve the status of any appropriation in whole or in part.<sup>129</sup> An appropriation, consequently, cannot be reinstated by beneficial use of water after ten years of total or

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other interested persons an opportunity to be heard and to present evidence on any matter pertinent to the questions at issue." *Id.* § 11.181.

122. *See id.* § 11.182(a)(1).

123. *See id.* § 11.182(a)(2).

124. *See id.* § 11.182(a)(3).

125. *See id.* §§ 11.182(b)(1),(4).

126. *See id.* §§ 11.182(b)(2),(3).

127. *See id.* § 11.184.

128. *See id.* § 11.183.

129. *See id.* § 11.185.

partial nonuse. Second, a person affected by the commission's inaction may file suit in Travis County against the commission to show cause why it should not be directed by the court to take immediate action.<sup>130</sup>

#### IV. BURDEN OF PROOF AND DEFENSES IN CANCELLATION PROCEEDINGS

One or more defenses exist in each of the cancellation statutes. Proof of beneficial use for an authorized purpose, however, is the only defense in a total cancellation proceeding.<sup>131</sup> Likewise, proof of beginning construction is the only defense in a cancellation proceeding for inaction within the time allowed in a permit.<sup>132</sup> Intent, diligence, and/or justification are defenses in all other cancellation proceedings.<sup>133</sup>

To cancel an appropriation for three successive years of willful abandonment, it must be shown, first, that the appropriator intended to give up the right and, second, that the appropriator relinquished control and use of the water.<sup>134</sup> The burden of proof in an abandonment proceeding is on the party asserting willful abandonment.<sup>135</sup> Intent to abandon must be shown by clear and satisfactory evidence.<sup>136</sup> The necessary intent may be shown by either the declaration of the appropriator or may simply be inferred from the appropriator's actions.<sup>137</sup> Again, mere nonuse of water is not sufficient in itself to show abandonment.<sup>138</sup>

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130. *See id.* §§ 5.352, 5.354.

131. *See Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 650-51 (Tex. 1971); TEX. WATER CODE ANN. § 11.177 (Vernon Supp. 1986).

132. *See* TEX. WATER CODE ANN. § 11.146(a) (Vernon Supp. 1986).

133. *See id.* §§ 11.030, 11.146 (b) & (f), & 11.182.

134. *See City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 425-28 (1961).

135. *See City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357, 376 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *Lower Nueces Water Supply Dist. v. Cartwright*, 274 S.W.2d 199, 208 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

136. *See City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357, 376 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *Lower Nueces Water Supply Dist. v. Cartwright*, 274 S.W.2d 199, 208 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

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

138. *See City of Corpus Christi v. Nueces County Water Control & Improvement Dist.*

To cancel an appropriation once construction has begun, it must be shown that the appropriator failed to work diligently and continuously to completion.<sup>139</sup> The commission has the burden of proof in this type of cancellation proceeding, which in itself is a defense for the appropriator. Assuming, however, that evidence of noncompletion within the time allowed is sufficient to shift the burden, the appropriator would have the burden to show that all reasonable diligence was exercised under the circumstances. Whether the appropriator worked diligently will thus depend upon the facts and circumstances in each particular case.

The partial cancellation statute does not specifically state who has the burden of proof; rather, it only states what the commission must find.<sup>140</sup> Because the executive director initiates the proceeding, it is reasonable to assume the burden of proof rests with the executive director.<sup>141</sup> Regardless of where the burden rests, the appropriator can defend against a partial cancellation by showing that partial nonuse has been justified or that there is a bona fide intention of beneficially using the previously unused portion within a reasonable time.<sup>142</sup> Therefore, considering all the required findings in a pretrial cancellation proceeding,<sup>143</sup> partial cancellation may prove to be as difficult as cancellation for willful abandonment.

## V. AVOIDING CANCELLATION

Various means are available to avoid the cancellation of an appropriation. An extension of the time within which to begin or complete the construction is the remedy for the permittee who cannot commence or complete construction within the initial time allowed in the permit.<sup>144</sup> There is no statutory limit on either the length or the number of extensions that the commission may order. The commission, however, has adopted rules governing applications for extensions

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No. 3, 540 S.W.2d 357, 376 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); *State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728, 759 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.); *City of Anson v. Arnett*, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

139. *See* TEX. WATER CODE ANN. §§ 11.146(b), (f) (Vernon Supp. 1986).

140. *See id.* § 11.182(a).

141. *See id.* §§ 11.179, -.181.

142. *See id.* § 11.182(a)(3).

143. *See id.* § 11.182.

144. *See id.* § 11.145(a).

of time to commence or complete construction.<sup>145</sup> These rules provide that an application for an extension must be filed before the expiration of the time period to commence or complete the construction.<sup>146</sup> The same notice as mandated for the original permit application is required if the proposed commencement date is more than four years from the date of issuance of the permit or if the proposed completion time is more than five years from the initial completion date.<sup>147</sup> The regulations are silent on the length or number of extensions.

A matured appropriation right to water is undoubtedly a vested right.<sup>148</sup> As such, it can be sold, assigned, or leased in whole or in part.<sup>149</sup> Such transfers must be evidenced by a written instrument filed with the county clerk and the commission.<sup>150</sup> Selling, assigning, or leasing the appropriative right to someone who has a present or

145. See Tex. Water Comm., 11 Tex. Reg. 1175-1176 (1986) (adopted as emergency rule 31 TEX. ADMIN. CODE §§ 307.61 to -.63).

146. See 31 TEX. ADMIN. CODE § 307.61. Section 307.61 provides:

Within 90 days after the issuance of a permit to appropriate state water by direct diversion, a permittee shall begin actual construction of his proposed facilities. If the work is not commenced within the time period, the permittee may apply in writing for an extension for a specified period of time setting forth the reasons why the work could not be begun within the time allowed. The commission may extend the time to begin construction for a period not to exceed 12 months from the date of the issuance of the permit.

*Id.* § 307.61.

147. See *id.* § 307.63. Section 307.63, in part, recognizes:

An application for extension of time to complete work may be granted upon application to the commission. Failure to apply for an extension of time or failure to complete the work within the time required in the permit may cause cancellation or forfeiture of the permit. The permittee may apply in writing for an extension of time setting forth the reasons why the work could not be completed within the time required. . . . If the proposed completion time is more than five years from the date of completion required in the original permit, notice and hearing in the manner of a new application for a permit will be required. Otherwise, no such notice is required.

*Id.* § 307.63

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

149. See *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1947, no writ); *Fairbanks v. Hidalgo County Water Improvement Dist. No. 2*, 241 S.W.2d 542, 545 (Tex. Civ. App.—Austin 1923, writ dismissed); W. HUTCHINS, *TEXAS LAW OF WATER RIGHTS* 223-28 (1961). For a complete review and discussion of the regulations governing a sale, assignment, or lease of an appropriation, see Schwartz, *New Water Project in Overappropriated Basins: Transfers of Water Rights in Texas*, Proceedings, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS (1985).

150. See TEX. WATER CODE ANN. §§ 11.040, -.136 (Vernon Supp. 1986); Tex. Water Comm'n, 11 Tex. Reg. 1176 (1986) (adopted as an emergency rule 31 TEX. ADMIN. CODE §§ 297.82 to -.83).

expected need can prevent cancellation if the transferee beneficially uses the water appropriated. If, however, the years of total or partial nonuse has elapsed, use by the transferee will not reinstate the right.<sup>151</sup>

Cancellation can also be prevented by changing the purpose or place of use, or point of diversion, if such change will result in beneficial use of water.<sup>152</sup> In order to do this, the water right must be amended before any change is made. Thus, an application to amend a water right must be filed with and approved by the commission.<sup>153</sup> The change in purpose or place of use or the point of diversion may be permanent or temporary. Amendment of the water right is a flexible and efficient means to avoid cancellation.

## VI. CONCLUSION

In determining whether there is unappropriated water available the Water Commission is required to assume that all existing water rights are fully exercised when in fact substantially less are actually being beneficially used. The state has the constitutional duty to conserve its water resources. As a general rule, beneficial use of water is conservation of the resource, and nonuse of appropriated waters is equivalent to waste. The Supreme Court of Texas has concluded that water can be made available for future appropriation by cancelling appropriations that are not being beneficially used to the limit provided in the permit, certified filing, or certificate of adjudication. Unless the legislature intervenes, the state will be forced to begin extensive cancellation proceedings to fulfill its constitutional duty to conserve its valuable water resources.

The Texas cancellation statutes provide protection to appropriators by their generous time periods and defenses. Total inaction or nonuse are the only situations that do not have any defenses. Many unanswered questions undoubtedly will be presented in future cancellation proceedings. The following are but a few examples:

1. Who has the burden of proof in partial cancellation proceedings?
2. Can an appropriation be cancelled if water is being beneficially used for purposes other than those authorized or on land other than that

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151. See TEX. WATER CODE ANN. § 11.185 (Vernon Supp. 1986).

152. See *id.* § 11.122 (cancellation can be prevented if there will be beneficial use of water under the amended permit).

153. See *id.* § 11.122.

specified? If so, is the present owner responsible for unauthorized uses by previous owners?

3. Can riparian rights be cancelled?

4. Can an appropriation be cancelled if a lessee or an assignee fails to use water or uses water for other purposes or on different land?

5. Does an applicant for an appropriation have standing in a cancellation proceeding or to institute a suit to compel the Water Commission to initiate cancellation proceedings?

These and many other issues will be resolved by the courts in the absence of legislative action. In addition to defending against cancellation, an appropriator can avoid cancellation. If construction cannot be started or completed within the time fixed in the permit, the permittee can apply for an extension of time. A water right can be sold, assigned, or leased to allow beneficial use. Amending an appropriation for a permanent or temporary change in purpose or place of use is an alternative to nonuse.

Cancellation is not an unreasonable remedy to protect the state's interest as well as the interest of junior appropriators or future applicants. The present cancellation procedures may be too cumbersome for the short-term solution in over-appropriated river basins. As the population and economy of Texas grow, increasing demands will be placed on the state's water resources. The legislature will receive increased pressure to shorten the period of nonuse and to provide for quicker cancellation procedures. The water right holder must be aware of growing demands and beneficially use the water appropriated or lose the right.