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Frank R. Booth

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OWNERSHIP OF DEVELOPED WATER: A PROPERTY RIGHT THREATENED

FRANK R. BOOTH*

* Partner, Booth & Newsom, Austin, Texas; B.A., J.D., University of Texas; former Assistant Attorney General of Texas; former Executive Director of the Texas Water Rights Commission.

I. INTRODUCTION

Control of developed water is a conservation, economic, and water quality issue, but more fundamentally, it is a property rights issue. Developed water initially was defined as new water added to a watercourse by reason of artificial work, which normally would not be available in the stream absent the efforts of the developer.[1] This classical definition has been expanded to include any water which has been lawfully diverted and made available for fruitful purposes by the expenditure of money and labor of the appropriator.[2] With improved water conservation and management techniques, strengthened water quality standards, and a progressively limited supply of state water available for new appropriation, reclaimed or developed water, especially treated municipal effluent, will become a significant water supply source.

Subject primarily to water quality concerns, appropriators in Texas traditionally have assumed the right to control the disposition of their developed water. This assumed right is now challenged by agency rules which seek to retroactively impose administrative authority over an appropriator's ability to recycle and reuse its developed water. Legislation to resolve unanswered jurisdictional and constitutional questions regarding the use and ultimate disposition of developed water was considered and defeated during the 1985 legislative session. As a result, an appropriator's right to control and beneficially use his developed water, especially his power to contract with others as to its disposition, remains problematical.

II. DEFINITIONAL AND LEGAL CONCEPTS OF DEVELOPED WATER

A. *Definitional Overlap*

Water upon diversion and application to a beneficial use is removed from the supply of water generally considered available for appropriation by others. Stated differently, use by one defeats the claims of all others to that water. When a water user reclaims that part used but not consumed, he develops a new supply of water. Thus the category of developed water generally may encompass waters described as

1. *See* W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 541 (1961).

2. *See* Ide v. United States, 263 U.S. 497, 506 (1924); Harrell v. F. H. Vahlsing, Inc., 248 S.W.2d 762, 768 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

drainage, seepage, return water, or wastewater, including municipal effluent, that is reclaimed.[3]

Other related terms need to be distinguished, for in this area it helps to understand what reclaimed water is *not.* It is not surplus water. Surplus water is that amount of water over and above what is actually needed for use.[4] Water diverted for the purpose of pushing useable water through gravity flow irrigation systems can be considered surplus water. Reclaimed water is not salvaged water. "Salvaged waters are parts of a particular stream or other water supply that have been lost, as far as beneficial use is concerned, to any of the established users, but are saved from further loss from the supply by artificial means and so are made available for use."[5] Salvaged water generally is treated similarly to developed water in that in both instances the person who makes such water available is entitled to its use.[6] The key distinction between these concepts and reclaimed, developed water is that reclaimed water *has* been once beneficially applied.

The immediate purpose of water reclamation is to secure the availability of water for subsequent use. Recycling water has long been a common practice in process industries. Subsequent use of sewage effluent for irrigation, cooling, and process water also is well established.[7] Although "reuse" often is applied to all forms of subsequent

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3. *See* W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 541-42 (1961); Clark, *Background and Trends in Water Salvage Law,* 15 ROCKY MTN. MIN. L. INST. 421, 436-38 (1969).

4. *See* Tex. Water Comm'n, 31 TEX. ADMIN. CODE § 301.71 (Hart 1986) (surplus water is water taken from any source in excess of needs and not used beneficially for the purpose authorized by law); Tex. Water Comm'n, 11 Tex. Reg. 255 (1986) (prop. to be codified at 31 TEX. ADMIN. CODE § 297.46).

5. 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 565 (1974).

6. *See id.* at 565-66; *see also* Comment, *Water Saved or Water Lost: The Consequences of Individual Conservation Measures in the Appropriation States,* 11 LAND & WATER L. REV. 434, 436-41 (1976). *But cf.* Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321, 1323-24 (Colo. 1975) (making salvaged water subject to call of prior appropriators). *See generally* Clark, *Background and Trends in Water Salvage Law,* 15 ROCKY MTN. MIN. L. INST. 421 (1969) (discussing water salvage); Pring & Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West,* 25 ROCKY MTN. MIN. L. INST. 25-1, 25-26 to -28 (1979) (briefly describing the legal hurdles facing water salvagers).

7. TEXAS DEP'T OF WATER RESOURCES, 2 WATER FOR TEXAS: TECHNICAL APPENDIX II-18 (1984). In the pulp and paper industry for example, water is used without additional treatment in different stages of processing. Wastewater is frequently used for irrigation and for cooling electric power generators.

use, the term best describes succeeding uses which are the same as those originally made. A city *reuses* water when it collects its sewage effluent, treats it, and reintroduces it into the municipal watersystem. Successive use best describes subsequent applications of developed water for qualitatively different purposes, such as when a municipality sells its effluent for agricultural or industrial purposes.[8] A third type of reuse, involving the exchange value of water, is sometimes recognized.[9]

B. *Legal Rights in the Use of Developed Water*

1. Basic Property Ownership Concepts

State ownership of water flowing in streams and rivers is the foundation of western water law and is expressed in different ways in different jurisdictions. For example, the waters of the ordinary flow and underflow of the rivers and natural streams in Texas, stormwater, floodwater, and rainwater are the property of the state, to be held in trust for the use and benefit of all the people.[10] The corpus of water which flows in water courses has also been described as being in the "negative community," the "common," or the property of the public, or as in Utah, "nobody's property."[11] The corpus of water, therefore, cannot be privately owned while in its natural condition.[12]

This is not to say that there can be no private rights of property in water while it is still flowing. The right to appropriate state water in Texas for example, when acquired in the manner provided in the Water Code and as evidence by a permit, constitutes a usufructory

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8. *See* Denver v. Fulton Irrigation Ditch Co., 506 P.2d 144, 147 (Colo. 1973).

9. Recycling also includes the situation where City A sells raw water to City B on the condition that City B return its treated effluent to City A's reservoir. Wilson, *The Effect of Recyling on Water Use and Legal Problems of Re-Allocation,* PROCEEDINGS OF A CONFERENCE ON FUTURE WATER USE IN TEXAS 129 (Texas A & M University 1976). The situation should also be considered where irrigators owning senior rights allow municipalities a first use and receive in return treated effluent such that "potential pollutants take on measurable value in the production of agricultural products." Vranesh, *Water Planning for Municipalities,* 24 ROCKY MTN. MIN. L. INST. 865, 873 (1978).

10. *See* TEX. WATER CODE ANN. § 11.021(a) (Vernon Supp. 1986).

11. *See, e.g.,* Adams v. Portage Irrigation, Resource & Power Co., 72 P.2d 648, 653 (Utah 1937) (water while flowing naturally in the stream "must of necessity continue common by law of nature and therefore is 'nobody's property' "); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 140 (1974); 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 63, at 145-46 (1911).

12. *See* Kirk v. State Bd. of Irrigation, 134 N.W. 167, 168 (Neb. 1912) (running water is *publici juris* — the property of the public).

right to the water, which is itself characterized as a property right.[13] Although it is a well-established principle of western water law that the holder of a permit to divert and use state water acquires no specific ownership interest in the corpus of the water prior to diversion, he does have a right of possession and use exercisable after diversion.

Although a matured appropriative right is a vested right, a permit authorizing the appropriation of state water is merely a license evidencing the holder's intent to divert and use state water.[14] No right to appropriate state water is perfected until water has been beneficially used for a purpose specified in the permit.[15] That is, issuance of the permit absent actual beneficial use of water does not confer on the holder any proprietary interest in the corpus of the water.[16] The usufructuary interest evidenced by the permit however, is a real property right which is subject to ownership, disposition, and litigation as is any other form of private property.[17]

In prescribing the manner in which a private usufructuary right in state water may be obtained, states universally impose limitations on its exercise. Most commonly, diverted water must be applied to beneficial use, be in actual physical possession,[18] and not be taken in such a way that its use impairs the right of senior and superior appropriators.[19] These conditions shape the proprietary interest an appropriator has in water after it is diverted and separated from the source of supply. These conditions are also enunciated at the time a permit is granted.

Qualified by whatever conditions are stated in the permit, an appropriator receives a usufructuary right to take water. Upon exercise of

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13. *See* Clark v. Briscoe Irrigation Co., 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1974, no writ); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 152 (1974) (valuable property right).

14. *See* Motl v. Boyd, 116 Tex. 82, 124, 286 S.W. 458, 475 (1926).

15. *See* TEX. WATER CODE ANN. § 11.026 (Vernon Supp. 1986).

16. *See* Motl v. Boyd, 116 Tex. 82, 124, 286 S.W. 458, 474 (1926); South Texas Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.).

17. *See* Lakeside Irrigation Co. v. Markham Irrigation Co., 16 Tex. 65, 75, 285 S.W. 593, 596 (Tex. Comm'n App. 1926, opinion adopted).

18. This second common requirement has been eroded to the extent that some states have begun to recognize appropriation for instream uses. *See generally* Huffman, *Instream Water Uses: Public and Private Alternative,* WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, & THE ENVIRONMENT 249 (1983).

19. *See* California Trout, Inc. v. State Water Resources Control Bd., 90 Cal. App. 3d 816, 820, 153 Cal. Rptr. 672, 676 (1979); Fort Lyon Canal Co. v. Amity Mutual Irrigation Co., 688 P.2d 1110, 1114-15 (Colo. 1984); ARIZ. REV. STAT. ANN. § 45-131(B) (Supp. 1984-85).

that right, it is generally held that the appropriator receives a personal property interest in the water actually taken.[20] Thus, once state water is lawfully diverted and applied to beneficial use, the general rule in the western states is that the appropriator acquires ownership of the particles of water. As noted by the Washington Supreme Court in *Madison v. McNeil,*[21] "[w]ater, after it has been diverted from a natural stream and taken into a reservoir and distributing pipes, takes the character of personal property, the ownership of which rests in the appropriator . . . ."[22] Idaho provides private ownership of the corpus of water after diversion, but qualifies that ownership with the requirement of beneficial use.[23]

There are notable exceptions. Arizona for example provides that "[w]ater, being public property in a running stream, continues to be public property even when diverted for beneficial uses, and remains such until actually applied to such uses."[24] Although Arizona retains ownership of the corpus of water, the appropriator is considered to be the lawful custodian of the diverted water.[25]

In all of the western states, proprietary rights in water actually diverted are lost when that water is abandoned to a public watercourse, and the abandoned water once again becomes public property subject to appropriation.[26] The right to recapture water that has not yet left

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20. *See* Brighton Ditch Co. v. City of Englewood, 237 P.2d 116, 120 (Colo. 1951); *see also* 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (1911) (the individual particles of water diverted into an artificial structure of waterworks become *private* property, having as particles, the characteristics of personal property). *But see* Fudicar v. East Riverside Irrigation Dist., 41 P. 1024, 1026, 109 Cal. 29, 36 (1895) (water, while flowing in a canal or pipe which is real property, is also real property); Mudge v. Hughes, 212 S.W. 819, 824 (Tex. Civ. App.—1919, no writ) (water, while in canals for irrigation purposes, is real property); 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 149-51 (1974) (describing California rule that water does not become personalty as soon as it is diverted, but retains its character as realty until the water is delivered to the consumer).

21. 19 P.2d 97 (Wash. 1933).

22. *Id.* at 98.

23. *See* Glaven v. Solmon River Canal Co., 258 P. 532, 534 (Idaho 1927).

24. Slosser v. Salt River Valley Canal Co., 65 P. 332, 336 (Ariz. 1901).

25. Although one making a lawful diversion from a public stream does not become an owner of the *corpus,* he does become the lawful custodian of the diverted water with any appurtenant rights and responsibilities. *See id.* at 336; *see also* Gould v. Maricopa Canal Co., 76 P. 598, 601 (Ariz. 1904); 1 W. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES 145 (1974).

26. *See* Nebraska v. Wyoming, 325 U.S. 589, 637 (1945); Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 61, 13 Cal. 2d 343, 345 (1939); Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764, 773 (Wyo. 1925).

A different situation arises when the release is planned as part of a delivery system. *See* City

the land of its application cannot, however, be lost by abandonment.

The holder of a permit to appropriate water in Texas possesses a usufructuary right to use the water. The permit holder's grant of a right to use water, as opposed to title to the corpus of water, is recognized as a valuable property right which cannot be taken without compensation and due process of law.[27] It is at the point when water is lawfully diverted that the nature of the proprietary interest in that water becomes unclear.

Wells Hutchins suggested, based upon *Lakeside Irrigation Co. v. Markham Irrigation Co.*,[28] that water in Texas once "severed from the natural resource and reduced to physical possession" loses its character as state water and becomes the private property of the appropriator.[29] *Lakeside Irrigation* involved an irrigator's right under his grant from the state to have water flow into his canals and ditches free from upstream interference.[30] The Commission of Appeals noted that although the downstream irrigation company's interest in the water was in the nature of an incorporeal hereditament, the company had the right to have the water flow into his ditches, but that the company "did not own the corpus of the water until it shall enter its ditch."[31] Hutchins used this quoted language to infer that once water enters the ditch, its appropriator has title to the particles, or corpus of that water.

In 1956 the Galveston Court of Appeals in *South Texas Water Co. v. Bieri*,[32] took a contrary view, holding that an appropriator of water

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of Los Angeles v. Glendale, 142 P.2d 289, 294, 23 Cal. 2d 76, 78 (1943). The California Supreme Court stated:

> Plaintiff had a prior right to the use of the water. . . . It did not abandon that right when it spread the water for the purpose of economical transporation and storage . . . Early in the history of the state, this court recognized the advantage of permitting the use of natural surface facilities, stream beds, dry canyons and the like, for the transporation of water. . . .

Id. at 294, 23 Cal. 2d at 78.

27. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 649-50 (Tex. 1971); Board of Water Eng'rs v. McKnight, 11 Tex. 82, 91, 229 S.W. 301, 304 (1921); Board of Water Eng'rs v. Slaughter, 382 S.W.2d 111, 116 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.).

28. 285 S.W. 593 (Tex. Comm'n App. 1926, opinion adopted).

29. *See* W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 80 (1961).

30. *See* Lakeside Irrigation Co. v. Markham Irrigation Co., 285 S.W. 593, 593 (Tex. Comm'n App. 1926, opinion adopted).

31. *See id.* at 597.

32. 247 S.W.2d 268 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.).

from a public stream does not acquire ownership of the corpus of the water but only the right to use the water for the purposes specified in the permit.[33] In *Bieri,* the South Texas Water Company had a permit to appropriate water to irrigate a specific tract of land.[34] Bieri owned land outside this permit area and irrigated his land with water from a public stream containing seepage water, run-off, and drainage water originating from the permit area. The water company argued that Bieri owed the company for the water obtained from the stream based upon an oral agreement, conversion, and quantum meruit.[35] The court held that there was insufficient evidence that the water company had exercised any lawful right or control in the drainage water outside its permit area, or that the water was subject to the water company's control or possession.[36] The court noted that under state law, an "appropriator of water from a public stream does not acquire the ownership or corpus of the water but merely acquires the right to the use thereof for the purposes set forth in the permit under which he appropriates."[37]

The Texas Supreme Court, in *Texas Water Rights Commission v. Wright,*[38] sustained the validity of the cancellation statutes and held that an appropriator receives only a right to use state water for beneficial purposes. The state, it said, is at all times the owner of the corpus of the water, "subject only to the exhaustion of the corpus as a result of beneficial use."[39] The *Wright* court was presented with issues involving an appropriator's rights in water which had not been beneficially used.[40] The facts in *Bieri* clearly established that the water in that case, although beneficially used, was abandoned and was no longer under the possession and control of the appropriator.[41] Since neither case involved a situation where an appropriator sought to re-

33. *See id.* at 272.

34. *See id.* at 269.

35. *See id.* at 270.

36. *See id.* at 270.

37. *Id.* at 272.

38. 464 S.W.2d 642 (Tex. 1971).

39. *See id.* at 647.

40. The permits subject to cancellation in *Wright* were used in conformity with statutory requirements until 1954, when a flood destroyed the diversion facilities. From that time until 1967 water was not beneficially used. *See id.* at 644.

41. *See* South Texas Water Co. v. Bieri, 247 S.W.2d 268, 273 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.). The court in *Bieri* held that there was no evidence that the South Texas Water Company exercised any control of its drainage water. *See id.* at 273.

use water, an appropriator's interest in water after it has been diverted and beneficially used must be analyzed in view of the doctrine of developed water.

2. Doctrine of Developed Water

As mentioned, the doctrine of developed water provides that one who makes available a supply of water that was not previously available is entitled to its use as long as its operations do not interfere with the prior right of others. The developed water doctrine evolved largely from conflicting claims to irrigation wastewater.[42] Because irrigation use is only partially consumptive, substantial quantities of seepage and run-off water can be collected in drainage ditches and reused on the same land or sold for further use elsewhere. Conflicts arose when others made claim to wastewater so collected or "developed" by the original appropriator. In *Ide v. United States,*[43] the United States Supreme Court noted the general rule protecting the water developer in such a situation:

> One, who by the expenditure of money and labor diverts appropriated water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule.[44]

The act of a municipality or other political subdivision in capturing and treating municipal sewage effluent after the initial beneficial use is analogous to the act of an irrigator who captures and uses his drainage water, and both situations fit within the description of developed water. In the latter case, water is diverted from a watercourse and put to beneficial use for the irrigation of land. Some water escapes from the canals or other carrying facilities, and some flows from the surface or seeps through the subsurface without being consumed and is captured by drainage ditches. The water, collected by the artificial works of man, is developed water which is available for use by the appropri-

42. *See* 2 W. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES 565-67 (1974).

43. 263 U.S. 497 (1923).

44. *Id.* at 506 (quoting United States v. Haga, 276 F. 41, 43 (S.D. Idaho 1921)).

ator who, through the expenditure of money and labor, has made the water available for further use.

In the case of a municipal water supply, water is diverted, treated, and delivered to the customers of a city. When that city operates a sewage collection and treatment system, it expends money and labor to construct a system to collect water which has not been consumed as a result of its customers' uses. The water is then treated, and in the form of effluent, can be reused instead of being discharged into a watercourse. The municipality has therefore developed a new source of supply which otherwise would not have been present absent the expenditure for capturing and treating sewage effluent.[45]

a. Doctrine of Developed Water in the Western States

Although the consensus opinion in the western states is that so long as an appropriator has dominion over his used water he can recapture it and make beneficial reuse of it, the states' treatments of developed water have not followed a consistent pattern. An Arizona court recognized in 1924 a right in persons who recover drainage waters put into the ground by artificial irrigation to dispose of such waters by sale or otherwise.[46] Such waters are not naturally in the ground, the court reasoned, and therefore are not subject to appropriation under state law.[47] Conversely, where an appropriator chooses not to recapture its developed water, a lower landowner may use the water that flows through his land, but he does not thereby earn a vested right in the continuance of that flow. The initial user retains the right to deprive the lower user of the developed water entirely, either by preventing waste, or by recapturing and using any waste or surplus water.[48]

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45. The Colorado Supreme Court has determined, however, that to turn sewage effluent back into the river will not increase the river's flow above what it would have been had the water not been diverted; therefore, it is not developed water. *See* Pulaski Irrigation Ditch Co. v. City of Trinidad, 203 P. 681, 683 (Colo. 1922).

46. *See* Brewster v. Salt River Valley Water Users' Ass'n, 229 P. 929, 934 (Ariz. 1924). *Brewster* was decided under a statutory formulation almost identical to the present one which provides that the waters of all sources, including waste and surplus water belong to the public and are subject to appropriation and beneficial use. *See* ARIZ. REV. STAT. ANN. § 45-131A (Supp. 1984-85).

47. *See* Brewster v. Salt River Valley Water User's Ass'n, 229 P. 929, 934 (Ariz. 1924).

48. *See* Lambeye v. Garcia, 157 P. 977, 979 (Ariz. 1916) (where appropriator entered into an association with others, whereby overflow caught and collected for benefit of all association members, wastewater question is eliminated, and likewise the former interceptor's claimed rights are extinguished); *compare* Wedgworth v. Wedgworth, 181 P. 952, 954 (Ariz. 1919) ("surplus water" not subject to prior appropriation for any use so that any property right is

California has several statutes aimed at expanding the use of developed water,[49] although there remains judicial precedent to protect downstream users of effluent return flow.[50] The rules are different when the return flows originate from imported or foreign waters. Water importers are not required to maintain discharged flows even when failure to do so impairs the diversion capabilities of lower appropriators. Importers may retake the water still in their possession at a point of drainage and make subsequent beneficial use.[51] A further distinction between imported and in-basin water was drawn in *City of Los Angeles v. City of San Fernando*[52] where the court found that imported water could be recaptured even after it had commingled with natural waters in an underground basin.[53]

Water in ditches constructed to collect seepage or wastewater are available for appropriation in Idaho with the following caveat:

> [Such appropriation is] subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. His control is not dependent upon continuous actual possession, and in the absence of abandonment or forfeiture of his right to its use, he may assert his right, which is not affected by his once having applied it to a beneficial use.[54]

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established by such appropriation and use, but refers to water applied but not consumed in the process of irrigation) *with* Salt River Valley Water User's Ass'n v. Kovacovich, 411 P.2d 201, 202 (Ariz. 1966) (water saved was appurtenant to the land for which it was appropriated and could not be used on other lands).

49. *See, e.g.,* CAL. WATER CODE §§ 460-64 (West Supp. 1985) (wastewater reuse); *id.* §§ 13,550 to -,551 (water reclamation); *id.* §§ 13,955 to -,969 (water conservation bonds).

50. *See* Scott v. Fruit Growers Supply Co., 258 P.2d 1095, 1098, 202 Cal. 47, 55 (1927) (when effluent discharged into a stream and has been appropriated downstream, upstream users may be barred from taking actions that will diminish this return flow); *see also* Brown & Weinstock, *Legal Issues in Implementing Water Reuse in California,* 9 ECOLOGY L.J. 243, 270 (1981) (noting rights of downstream effluent appropriators).

51. *See* Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 62, 13 Cal. 2d 343, 352 (1939) (where an artificial condition has become permanent and there has been a dedication to the public use, or where the drainage is wantonly stopped to harm a lower party, without other objection subsequent use may be had). *But cf.* People v. City of Roseville, No. 49608 (Cal. Super. Ct., Placer County, filed 1977) (California sought to restrict discretion of water importers to sell effluent to irrigators diverting water downstream from treatment plant, but case settled without decision on the merits).

52. 537 P.2d 1250, 14 Cal. 3d 199 (1975).

53. *See id.* at 1295, 14 Cal. 3d at 260-61.

54. Sebern v. Moore, 258 P. 176, 178 (Idaho 1927); *see also* Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1134 (Idaho 1980) (no appropriator of wastewater should be able to compel any other appropriator to continue wasting water to benefit the former because recognition of a right in a third person to enforce the continuation

Thus, a senior appropriator of water in Idaho retains his right to waste and seepage water, and may recapture it, even though such water has been used by a junior appropriator for as long as forty years.[55]

New Mexico includes within the definition of artificial surface waters, those collected from seepage, waste, and drainage from artificial works such that the accumulation depends upon human acts.[56] These artificial surface waters are primarily private and subject to beneficial use by the owner or developer.[57] In *Reynolds v. City of Roswell,*[58] the New Mexico Supreme Court held that the state engineer, in granting a permit to change the place of use of water rights, could not impose conditions requiring Roswell to discharge sewage effluent into a river in the same ratio and at the same locations as during a previous period.[59] In including municipal effluent in the class of artificial waters defined above, the court stated, "[t]reated sewage effluent is in the same category as water which has drained, seeped or percolated from a treatment plant which 'depend for their continuance upon the acts of man.' "[60] The court noted cases from other jurisdictions which hold that an appropriator has the right to reuse his wastewater; that no other appropriator can compel him to continue the waste of water for another's benefit; and that no appropriator has the right to rely on the same point of discharge or return of municipal sewage effluent.[61] New Mexico's Supreme Court earlier, in considering whether injecting private drain water into an underground basin would affect the flow of a river into which the water had previously been discharged, held that until private water reaches public water it can be diverted

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of waste will not result in more efficient uses of water); Reynolds Irrigation Dist. v. Sproat, 214 P.2d 880, 883 (Idaho 1950) (wastewater belongs to original appropriator and may be reclaimed if put to beneficial use).

55. *See* Colthrop v. Mountain Home Irrigation Dist., 157 P.2d 1005, 1007-08 (Idaho 1945); *see also* Cantlin v. Carter, 397 P.2d 761, 766 (Idaho 1964) (prior appropriated water remains with an appropriator unless abandoned); Thompson v. Bingham, 302 P.2d 948, 949 (Idaho 1946) ("as against original appropriator and owner, an adjoining landowner cannot acquire a prescriptive right to waste or sewage water").

56. *See* N.M. STAT. ANN. § 72-5-27 (1978).

57. *See id.* § 72-5-27; *see also In re* Langenegger, 326 P.2d 1098, 1100-01 (N.M. 1958).

58. 654 P.2d 537 (N.M. 1982).

59. *See id.* at 539.

60. *Id.* at 540.

61. *See id.* at 541 (citing Rock Creek Ditch & Flume Co. v. Miller, 17 P.2d 1074 (Mont. 1933) and Thayer v. City of Rawlins, 594 P.2d 95 (Wyo. 1979)).

and disposed of as the owner sees fit.[62] The state engineer therefore had no authority to insist that this private water continue to flow into the river.

Wyoming law recognizes that seepage and wastewater is private water while it remains on the land from which it originates. Thus where seepage water would naturally reach a stream if not intercepted, it is considered a part of the stream and must be permitted to return if the owner cannot make beneficial use of such seepage.[63] In *Fuss v. Franks,*[64] the Wyoming Supreme Court emphasized that the right to recapture and reuse was limited to the land for which the water was appropriated.[65] Upon leaving that land, if the water is tributary, it again becomes subject to appropriation with the original user having no superior rights in the water. The outcome of the case was that a farmer who constructed a wastewater collection ditch and for fifteen years sent his wastewater from the ditch into a highway borrow pit for a short distance to make further use of the water on another leased tract lost the right to reuse his collected water.[66] The court affirmed the state engineer's issuance of a permit for appropriation from the borrow ditch by another landowner, relying upon the appurtenancy doctrine followed in Wyoming that stated "waters become appurtenant to the lands for which they are acquired and, unless the statutes are followed with respect to change of use, the waters cannot be detached and assigned to other land without the loss of priority."[67]

The effect of *Fuss* on a Wyoming city's right to dispose of its effluent as it sees fit is unclear. One year earlier in a narrowly drawn opinion, the Wyoming court answered the question of whether downstream appropriators were entitled to compensation when a city changed its point of discharge of imported waters. *Thayer v. City of Rawlins*[68] held that the city has the unrestricted right to reuse, successively use, and make disposition of imported waters, that cannot be abandoned because "[t]he water is always different from year to

62. *See* Reynolds v. Wiggins, 397 P.2d 469, 471 (N.M. 1964).

63. *See* Bower v. Big Horn Canal Ass'n, 307 P.2d 593, 602 (Wyo. 1957); Binning v. Miller, 102 P.2d 54, 61 (Wyo. 1940).

64. 610 P.2d 17 (Wyo. 1980).

65. *See id.* at 20.

66. *See id.* at 19.

67. *Id.* at 20.

68. 594 P.2d 951 (Wyo. 1979).

year."[69] The court did not theorize with respect to any plan of complete consumption by the city, nor did it state the rule with respect to non-imported waters.

Colorado courts have adopted the minority view, holding that municipal sewage effluent is not developed water, based on their analysis that the water in effluent is not water which has been used for domestic purposes but is only used mechanically for the purpose of diluting and conveying away solid matter.[70] According to the Colorado court's reasoning, the water performs a service much like water used for hydroelectric power generation and must be returned to the stream just as water used for power generation is returned to the stream.

An early Colorado case held that an irrigator could not collect his drainage water and sell it for application on other lands using a stream bed as a carrier, even though the water was in a *sense* not natural to the stream.[71] The court reasoned that because these waters would eventually reach the stream if left alone, they were tributary to the stream and had been already appropriated by downstream users.[72] More recent Colorado courts have held that effluent containing water imported from other basins is developed water and may be used, reused, and disposed of by the developer.[73] Physical control of the water is not lost upon delivery to the customer nor upon delivery for treatment.[74] However, whether used water is originally from the basin of discharge or is imported, downstream appropriators are not

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69. *Id.* at 955.

70. *See* Pulaski Irrigation Ditch Co. v. City of Trinidad, 203 P. 681, 683 (Colo. 1922).

71. *See* Comstock v. Ramsey, 133 P. 1107, 1110 (Colo. 1913).

72. *See id.* at 1110; *see also* Trowel Land & Irrigation Co. v. Bijou Irrigation Dist., 176 P. 292, 296 (Colo. 1918) (seepage waters returning to stream are tributary to stream and may be diverted against prior appropriator's rights).

73. *See* City & County of Denver v. Fulton Irrigation Ditch Co., 506 P.2d 144, 146 (Colo. 1972). At the time of the decision Colorado statutes provided that an appropriator may make successive use of water lawfully introduced into a stream system from an unconnected stream system, provided that the foreign water can be distinguished from the water of the stream into which it is introduced. *See* COLO. REV. STAT. § 37-82-106 (1974). This section was amended in 1979 to make such right of successive use personal to the developer. *See* COLO. REV. STAT. § 37-82-106 (Supp. 1984). Developed water becomes a part of the natural stream when it is released from the dominion of the developer. *See id.* § 37-82-106. The Colorado Supreme Court noted, however, that Denver would have the right of reuse, successive use, and disposition of its developed water even without application of the statute. *See* City & County of Denver v. Fulton Irrigation Ditch Co., 506 P.2d 144, 147 (Colo. 1972).

74. *See* City & County of Denver v. Fulton Irrigation Ditch Co., 506 P.2d 144, 147 (Colo. 1972).

protected in the maintenance of return points of irrigation wastewater or of municipal effluent absent bad faith or unreasonable conduct.[75]

Federal courts have recognized the doctrine of developed water in such cases as *Ide v. United States*[76] and *Nebraska v. Wyoming.*[77] In Texas, a federal district court in *El Paso County Water Improvement District No. 1 v. City of El Paso,* acknowledged that the first users of project water could recover the drainage for repeated use within the project.[78] *City of El Paso* involved a claim by El Paso to water once used by the Rio Grande Reclamation Project and returned to the Rio Grande.[79] The particular water in question, however, was waste water because there was no further irrigation use for the water either by the project or those previously contracting for the water. The court said El Paso had as good a right to the water as anyone, but only *after* the project was through with it.[80] The district court, however, discussed with approval an arrangement between the city and the district whereby the city would substitute its discharged effluent for direct river flow,[81] but was reversed in this part of its decision based upon the appellate court's view of certain contractual arrangements.[82]

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75. *See* Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation, 499 P.2d 1190, 1193-94 (Colo. 1972). This opinion was issued simultaneously with the *Fulton Irrigation* case which recognized the right of disposition over imported waters. It is interesting to note that when the farmers in *Fulton Irrigation* complained that the city should use imported water in irrigation season giving the reclaimed water to its transferees and use in-basin water only during non-irrigation season, the court declared that such action by the city would be arbitrary, unreasonable, and unconstitutional. The court called for legislation on the point. *See* City & County of Denver v. Fulton Irrigation Ditch Co., 506 P.2d 144, 149 (Colo. 1972).

Colorado law currently recognizes that all waters in the state that are not in or tributary to a natural stream are subject to such administration and use as the general assembly may provide: "such nontributary waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority." COLO. REV. STAT. § 37-82-101 (Supp. 1984).

76. 263 U.S. 497, 505-06 (1924) (perfector of irrigation system entitled to recapture and utilize seepage).

77. 325 U.S. 589 (1945).

78. 133 F. Supp. 894 (W.D. Tex. 1955), *rev'd in part,* 243 F.2d 927 (5th Cir. 1957).

79. *See id.* at 923.

80. *See id.* at 924.

81. *See id.* at 925.

82. *See* El Paso County Water Improvement Dist. No. 1 v. City of El Paso, 243 F.2d 927, 933 (5th Cir. 1957).

b. The Texas Doctrine of Developed Water

Although the doctrine of developed water as enumerated by Texas courts is imprecise, it appears to adhere to the traditional premise that developed water must be under the exclusive control of the developer. Although the legislature has declared state ownership of "the water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the State,"[83] the Texas Water Code establishes a process by which persons may acquire rights to use unappropriated state water. An appropriator's right to take and use state water is limited by the terms of his permit which generally state the quantity of water that may be diverted and the purpose for which it may be taken.[84] No right to appropriate water is perfected unless the water has been beneficially used for a purpose stated in the original declaration of intention to appropriate water or in the permit issued by the Texas Water Commission or one of its predecessors.[85] Once the condition of beneficial use for authorized purposes is satisfied, the water right is a vested property interest.[86]

Although the rights of an appropriator to developed water have not been litigated extensively in Texas, a strong argument can be made that an appropriator has the right of disposition over any water he develops. In *Harrell v. F.H. Vahlsing, Inc.*,[87] the La Feria Water Control and Improvement District, Cameron County No. 3, appropriated state water under a permit from the State Board of Water Engineers and distributed the water for irrigation purposes.[88] The district also constructed and maintained a system of artificial drainage ditches to collect the water it had appropriated after that water was used, as well as some spillage, seepage, and subsurface drainage from lands through

83. TEX. WATER CODE ANN. § 11.021(a) (Vernon Supp. 1986).

84. *See id.* § 11.025 (right to use state water limited not only to amount specifically appropriated but also to amount which can be beneficially used); *id.* § 11.135 (permit shall specify, *inter alia,* use for which appropriation is to be made, description of source of supply, and amount of water authorized to be appropriated).

85. *See id.* § 11.026.

86. *See* Clark v. Briscoe Irrigation Co., 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1947, no writ).

87. 248 S.W.2d 762 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

88. *See id.* at 764.

which the ditches passed.[89] F. H. Vahlsing, Inc., contracted with the district to purchase this captured water for irrigation purposes. Harrell, who had been using water from the ditch without agreement from La Feria, asserted a conflicting claim to use the drainage water and a claim for loss of crops.[90]

The court was asked whether the right to use and control the water in the drainage ditch, and therefore the power to contract as to its disposition, was vested in the La Feria District, based upon the theory that the supply was created or developed by the district. The court agreed that, "as to all other persons or agencies with the possible exception of the State of Texas, . . . the La Feria District is possessed of a usufructuary right in and to the waters of its North Main Drainage Ditch under the doctrine of developed waters."[91] The court relied on the language from *Ide v. United States*[92] that considerations of public policy and natural justice strongly support awarding exclusive control of developed water to the one who creates the supply.[93]

Two years later the San Antonio Court of Appeals answered the issue raised by *Harrell* as to the authority of the state to grant permits to use developed water. In *Guelker v. Hidalgo County Water Improvement District No. 6,*[94] the Hidalgo County District sought to enjoin certain landowners from diverting water from drainage ditches located within the territorial boundaries of the Donna Irrigation District, which was a separate district and not a party to the suit.[95] The Donna Irrigation District had contracted with the Hidalgo County Water Improvement District No. 2, referred to as the San Juan District, to construct and maintain a sufficient drainage system to connect with the drainage system of the San Juan District and to remove the drainage water from that district. The Donna District then sold to J. C. Engleman, Jr., all of the water which entered its drainage system, whether from its territory, or from the San Juan District. Hi-

89. *See id.* at 764.

90. *See id.* at 764.

91. *Id.* at 768. The "possible exception" the *Harrell* court noted referred to the fact that the district had voluntarily sought and obtained a state permit to reappropriate the water from its ditches. That fact was not controlling, however, as the court described it as merely having "fortified" the claims based on the doctrine of developed waters. *See id.* at 768.

92. 263 U.S. 497 (1923) (quoting United States v. Haga, 276 F. 41, 43 (S.D. Idaho 1921)).

93. *See* Harrell v. F. H. Vahlsing, Inc., 248 S.W.2d 762, 768 (Tex. Civ. App.—San Antonio 1932, writ ref'd n.r.e.).

94. 269 S.W.2d 551 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

95. *See id.* at 552-53.

dalgo County Water Improvement District No. 6 claimed the drainage water as a successor under these contracts.[96]

The court ruled that the Donna District had the usufructuary right to the waters flowing in its main drains.[97] The district had the power to sell this usufructuary right, consistent with public policy; therefore, the appellee Hidalgo District No. 6, under contracts with Donna District, had become the owner of the water right to the exclusion of appellant landowners "for all time to come."[98] As to state regulation of the drainage water, the court said:

> The permits which appellee acquired from the State Board of Water Engineers are immaterial to any issue here raised. The waters entering and flowing in these drainage ditches were developed or captured waters, and the State Board of Water Engineers had no jurisdiction to issue a permit controlling their use.[99]

An irrigation permit, in addition to stating a specific use, must also describe the land to be irrigated.[100] State authorization is required to change the place of irrigation.[101] In both *Vahlsing, Inc.* and *Guelker,* reclaimed water was sold for use outside the respective districts' boundaries—presumably an area not described in the permits. The precedential value of these cases for the premise that a permit limits only the initial use of water may be made suspect by the fact that in both instances the water developer was a political subdivision endowed with specific powers. One of the statutory powers at the time of the decisions provided:

> Any Irrigation Water Improvement District now existing or hereafter to be created may sell any surplus water it may have, or have conserved,

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96. *See id.* at 552-53.

97. *See id.* at 553.

98. *See id.* at 553.

99. *Id.* at 555. *But see* Scoggins v. Cameron County Water Improvement Dist. No. 15, 264 S.W.2d 169, 173 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.) (although the court assumed that the proprietary or usufructuary right to drainage water belonged to the owners of the ditch, as between others holding permits from the state to appropriate from the ditch, the court adjudicated their rights on the priority of their permits). *See generally* W. HUTCHINS, TEXAS LAW OF WATER RIGHTS 543-44 (1961).

100. *See* TEX. WATER CODE ANN. § 11.135(c) (Vernon Supp. 1986) (providing that "[i]f the appropriation is for irrigation, the commission shall also place in the permit a description and statement of the approximate area of the land to be irrigated"). Statutes pertaining to water have included similar language since 1913. *E.g.,* Act of April 9, 1913, ch. 171, 1913 Tex. Gen. Laws 358.

101. *See* Clark v. Briscoe Irrigation Co., 200 S.W.2d 674, 682 (Tex. Civ. App.—Austin 1947, no writ).

> to lands in the same vicinity, for the purposes of irrigation, domestic or commercial uses; and any such District may contract to pump or deliver, for such purpose, to lands in the same vicinity of such Districts water which such lands may be entitled to appropriate under permit from the Board of Water Engineers of the State of Texas, upon such terms. . . .[102]

A similar provision was made for Water Control and Improvement Districts.[103] A reading of *Vahlsing, Inc.* and *Guelker* shows that the district's special powers were not made a basis for either decision. Indeed, these powers were not mentioned. The *Guelker* court went so far as to refuse to recognize any authority in the governing water agency to direct the use of developed water.

Whether an appropriator's rights in his developed water is characterized as private ownership or as a usufructuary right, it is clear that the developer possesses a significant interest in the use and disposition of the water. In granting permits to appropriate state water, the state relinquishes many of the attributes of ownership, and only retains those which are specified in the permit, and which are supplied by the Texas Constitution, statutes, and administrative regulations in effect at the time the permit is granted. For example, the state relinquishes the right of exclusive use and control of state water to the permitee, and the state cannot grant additional permits to use the water, either before or after diversion and use, until the permit is cancelled.[104]

An appropriator receives, however, only the right to use the water for beneficial and nonwasteful purposes.[105] Additionally, pursuant to its police power, the state retains authority to regulate the quality of the used water which is discharged.[106] Further, an appropriator has no right to continued nonuse—he may willfully abandon his right to divert and use state water[107] or the state may cancel, in whole or in

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102. TEX. REV. CIV. STAT. ANN. art. 7792 (Vernon 1925), *codified in* TEX. WATER CODE ANN. § 55.197 (Vernon 1986).

103. *See* TEX. REV. CIV. STAT. ANN. art. 7880-138 (Vernon 1925), *codified in* TEX. WATER CODE ANN. § 51.188 (Vernon 1986).

104. *See* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873, 876 (Tex. 1984) (water authorized to be diverted by permit not subject to additional appropriation until existing permit cancelled, forfeited, or otherwise invalidated).

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

106. *See* TEX. WATER CODE ANN. §§ 11.001 *et seq.* (Vernon Supp. 1986) (relating to water quality control and authority of Texas Water Commission to issue waste discharge permits).

107. *See id.* § 11.030 (if any lawful appropriation of state water willfully abandoned for

part, his permit when the water is not beneficially used.[108]

Although the right to use state water is limited to the amount of water which is or can be beneficially used for the purposes stated in the permit, there is no provision in the Water Code requiring diverted water which has been beneficially used, but not consumed as a result of such use, to be returned to the source of supply. Water Code section 11.046 requires only that *surplus* water be returned to the stream from which it was taken, and even then, the requirement applies only if the water can be returned by gravity flow and if it is reasonably practicable to do so.[109] Sewage effluent is not surplus water, but is *used* water and is not required by statute to be returned to the stream of origin.[110] An applicant for a water permit is not required by statute to estimate return flow or designate a return point.[111] With the narrow exception pertaining to surplus water then, the "grant" of water from the state is complete upon the water's application to beneficial use.

Based upon *Harrell v. F. H. Vahlsing, Inc.* and *Guelker v. Hidalgo County Water Improvement District No. 6,* an appropriator should retain exclusive control over the use and disposition of his developed water, subject only to the state's police power and any conditions imposed by the permit, statutes, and administrative rules in existence at the time the permit was issued. In other states, rights in developed water primarily have been based upon the conclusion that water diverted and used pursuant to a valid authorization from the state becomes the private property of the user.[112] This premise was recognized in dicta in *Lakeside Irrigation Co. v. Markham Irrigation Co.*[113] Arguably however, the supreme court in *Texas Water Rights*

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three successive years, the right to use the water forfeited and again subject to appropriation); *see also* City of Corpus Christi v. Nueces County Water Improvement Dist. No. 3, 540 S.W.2d 357, 376 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (party asserting abandonment of a water right must show willful intent to abandon).

108. *See* TEX. WATER CODE ANN. § 11.146 (Vernon Supp. 1986) (forfeiture of permit for failure to begin construction within the time specified in the permit); *id.* §§ 11.171 to -.186 (cancellation of permits and certified filings for ten consecutive years nonuse).

109. *See id.* § 11.046.

110. *See* Halsell v. Texas Water Comm'n, 380 S.W.2d 1, 7 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

111. *See* TEX. WATER CODE ANN. §§ 11.124, -.125 (Vernon Supp. 1986).

112. *See supra* nn.18-25 and accompanying text.

113. 116 Tex. 65, 74, 285 S.W. 593, 596 (Tex. Comm'n App. 1926, opinion adopted); *see also supra* nn.28-31 and accompanying text.

Commission v. Wright[114] held to the contrary when it declared ownership of state water existed "at all times." The *Wright* decision should be viewed, however, in the context of the facts and arguments presented to the court.

Prior to the *Wright* decision, it was widely believed that grants of water rights were grants of vested rights which created an ownership interest of the water in the permittee.[115] Indeed, Justice McClendon in *Clark v. Briscoe Irrigation Co.*[116] reviewed the historical and legal basis of the state's water laws at that time and held that there was no question that a perfected water right constituted a "vested interest in or title to the use of water thereby appropriated."[117] In *Wright,* however, the court concluded that the right one obtains by a water permit, although vested, is a right of use limited to beneficial and non-wasteful purposes.[118] The water covered by the permits in question was not being beneficially used, hence the state was in fact the owner of the water at all relevant times. The *Wright* decision, therefore, is not in conflict with the doctrine of developed water as applied in *Vahlsing* and *Guelker,* or the conclusion regarding private ownership rights in developed water as stated in *Lakeside Irrigation.*

This is not to say that the state cannot impose conditions upon the use of developed water at the time the original permit is granted. The state water agency, beginning with Permit No. 1945 issued in 1960, has sometimes provided in permits that all water beneficially used, but not consumed, be returned to the supply source. Basic concepts of property law consistently have recognized the right of an owner to convey his property subject to various terms and conditions. These conditions and limitations should not be applied retroactively, however, and it is submitted that restrictions on the use of developed water to be effective must have been in existence at the time the permit to appropriate state water was issued.

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114. 464 S.W.2d 642, 647 (Tex. 1971).

115. *See id.* at 647 (noting State v. Board of Water Eng's v. Slaughter, 382 S.W.2d 111 (Tex. Civ. App.—San Antonio 1964 writ ref'd n.r.e.); State v. Harrison, 407 S.W.2d 467 (Tex. 1966); City of Anson v. Arnett, 250 S.W.2d 450 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); Reeves v. Pecos County Water Improvement Dist. No. 1, 299 S.W. 224 (Tex. Comm'n App. 1927, holding approved)).

116. 200 S.W.2d 674 (Tex. Civ. App.—Austin 1947, no writ).

117. *Id.* at 679.

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

III. TEXAS WATER COMMISSION REGULATION OF USE OF DEVELOPED WATER

A. *Regulatory Scheme*

The Texas Water Commission is the state agency which has been delegated responsibility for implementing the Texas Constitution and statutes relative to the state's water resources.[119] The Commission has general jurisdiction over the issuance of water rights and water quality permits,[120] and may perform any acts expressed or implied by the Water Code which are "necessary and convenient" to the exercise of its delegated powers.[121]

The Commission and its predecessor agencies have used this authority to exert control over water reuse by administrative rule. One such rule states that all return and surplus water must be returned to the water supply or water course at the points stated in the permit or amendatory order.[122] This requirement could be read to apply only when a return point has been specified. The rule also provides, however, that the right to use water is limited to the purposes stated in the permit and explains that if an entity uses state water authorized for municipal purpose, it may not use or sell the effluent for any other

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119. *See* TEX. WATER CODE ANN. § 5.012 (Vernon Supp. 1986). In 1977 the Texas Water Rights Commission, the Texas Water Development Board, and the Texas Water Quality Board were abolished and merged into the Texas Department of Water Resources. *See* Law of June 16, 1977, ch. 870, § 9, 1977 Tex. Gen. Laws 2207, 2343. The 1977 Act also provided for a formal separation of the legislative, executive, and judicial functions of the Department of Water Resources, which were vested in the Texas Water Development Board, the executive director, and the Texas Water Commission. *See id.* § 1, at 2208 (formerly codified at TEX. WATER CODE ANN. § 5.012 (Vernon Supp. 1985)), *repealed by* Act of June 15, 1985, ch. 795, § 1.001, 1985 Tex. Sess. Law Serv. 5743, 5989 (Vernon). The Texas Department of Water Resources was reorganized into the Texas Water Commission and the Texas Water Development Board. *See* Law of June 15, 1985, ch. 795, § 10.004, 1985 Tex. Sess. Law Serv. 5743, 6008 (Vernon). The Texas Water Commission is now the state agency delegated primary responsibility for implementing the Texas Constitution and statutes relating to water. *See* TEX. WATER CODE ANN. § 5.012 (Vernon Supp. 1986). The Texas Water Development Board is the state agency primarily responsible for water planning and water financing. *See id.* § 5.012.

120. *See* TEX. WATER CODE ANN. § 5.013 (Vernon Supp. 1986).

121. *See id.* § 5.102(a).

122. *See* Tex. Water Comm'n, 10 Tex. Reg. 3472 (1985), *renewed,* 10 Tex. Reg. 4985 (1985) (emerg. rule affecting 31 TEX. ADMIN. CODE § 303.154) (expired March 3, 1986).

A new emergency rule relating to return and surplus waters became effective March 3, 1986. *See* Tex. Water Comm'n, 11 Tex. Reg. 1175 (1986) (prop. to be codified at 31 TEX. ADMIN. CODE § 297.45) (expires July 1, 1986). This rule is substantially the same as that cited above except for the omission of reference to the policy of discharge of treated wastewater.

purpose without first obtaining a new or modified permit from the Commission.[123] Presumably, the requirement to obtain a new or modified permit applies even where return of used water was never stipulated. By revision of that rule, first effective in March 1985, application of sewage effluent upon land sites is considered municipal use when conducted in specified circumstances aimed primarily at water quality or where the application is to a landscaped area owned by the sewage system permittee.[124] A simultaneous change to Rule 303.155 by implication included effluent within the category of "state water."[125]

A policy to "encourage the proper treatment and discharge of wastewater into state waters for subsequent beneficial reuse" was also announced at the same time.[126] Rule 341.140 requires the Water Commission, when reviewing water quality permit applications that do not contemplate discharge into state waters, to consider the effect that various disposal methods will have on water use and water planning, including the effect on availability of and demand for surface water supplies. The effect of these rules is to treat the reuse of wastewater, or the alternative disposal of wastewater, as an additional appropriation of state water which requires authorization. Notwithstanding the broad discretion afforded to the Texas Water Commission with respect to the conservation and development of state water, the commission's attempt to regulate the use of developed

123. *See* Tex. Water Comm'n, 10 Tex. Reg. 3472 (1985), *renewed,* 10 Tex. Reg. 4985 (1985) (emerg. rule affecting 31 TEX. ADMIN. CODE § 303.154) (expired March 3, 1986).

124. *See* Tex. Water Dev. Bd., 9 Tex. Reg. 6054-55 (1984), *adopted,* 10 Tex. Reg. 858-59 (1985) (codified at 31 TEX. ADMIN. CODE § 303.154) (return and surplus waters); *see also* Tex. Water Dev. Bd., 9 Tex. Reg. 6054 (1984), *adopted,* 10 Tex. Reg. 858 (1985) (codified at 31 TEX. ADMIN. CODE § 301.71) (definition of "municipal use"); 11 Tex. Reg. 1172 (1986) (prop. to be codified at 31 TEX. ADMIN. CODE § 297.1) (definition of "municipal use").

125. *See, e.g.,* Tex. Water Dev. Bd., 9 Tex. Reg. 6055 (1984), *adopted,* 10 Tex. Reg. 858-59 (1985) (codified at 31 TEX. ADMIN. CODE § 303.155) ("persons using state water, including effluent. . . ."); Tex. Water Comm'n, 10 Tex. Reg. 3472 (1985), *renewed,* 10 Tex. Reg. 4985 (1985) (emerg. rule affecting 31 TEX. ADMIN. CODE § 303.155) (expired March 3, 1986); Tex. Water Comm'n, 11 Tex. Reg. 1175 (1986) (prop. to be codified at 31 TEX. ADMIN. CODE § 297.46) (suppliers of water for irrigation).

126. *See* Tex. Water Dev. Bd., 9 Tex. Reg. 6055-56 (1984), *adopted* 10 Tex. Reg. 859 (1985) (codified at 31 TEX. ADMIN. CODE § 341.140); Tex. Water Comm'n 10 Tex. Reg. 3747 (1985), *renewed,* 10 Tex. Reg. 4991 (1985) (emerg. rule affecting 31 TEX. ADMIN. CODE § 338.140) (expired March 3, 1986). This provision is expected to be reissued as a proposed new rule in the near future. Rule 341.140 remains effective until that time.

water is suspect due to a myriad of unresolved jurisdictional and constitutional issues.

B. *Legal Considerations in Regulating Use of Developed Water*

1. Authority to Regulate

An administrative agency only has such powers as are expressly granted to it by statute or as can be necessarily implied from the authority conferred or duties imposed.[127] An agency's jurisdiction and the nature and extent of its powers must therefore be found within the constitutional and statutory provisions applicable to the agency.[128] The rules regulating the use of developed water, valid only if they implement the provisions of the Texas Constitution and laws of the state relating to the use of state water, were originally adopted pursuant to sections 5.011, 5.131, and 5.132 of the Water Code.[129] No additional constitutional or statutory authority other than the general authorization delineated by these sections can be cited.

The Water Code provides that the right to divert and use state water may be acquired only by obtaining a permit from the Water Commission. Once a permit is acquired, the right to use state water is limited to the amount of water stated in the permit which is or can be beneficially used for the purposes authorized. There is no provision in the Water Code requiring the return of water which has been used but not consumed as a result of such use. Perhaps even more important, there is nothing in the Water Code providing for the *reappropriation* of appropriated water. The supreme court has in fact expressly rejected such a concept.[130]

The fact that an agency has general supervision over a subject does not give the agency jurisdiction over all controversies that may arise. For instance, the Railroad Commission is charged with the responsibility of investigating all complaints against railroad companies and with ensuring that all laws concerning railroads are enforced.[131] Even

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127. *See* Martinez v. Texas Employment Comm'n, 570 S.W.2d 28, 31 (Tex. Civ. App.—Corpus Christi 1979, no writ).

128. *See* Blount v. Metropolitan Life Ins. Co, 677 S.W.2d 565, 574 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

129. *See* Tex. Water Comm'n, 10 Tex. Reg. 858 (1985) (codified at 31 TEX. ADMIN. CODE § 341.140).

130. *See* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873, 880 (Tex. 1984).

131. *See* TEX. REV. CIV. STAT. ANN. art. 6448, § 11 (Vernon 1966).

though railroad companies are required to keep grade crossings, roadways, and rights-of-way in proper condition for the travelling public,[132] the Railroad Commission lacks express or implied authority to issue orders requiring railroads to maintain their rights-of-way.[133]

Even though an agency may in fact be expressly empowered to act with respect to a particular matter, the operational parameters of the agency's statutory grant of authority may prevent the agency from exercising its delegated powers with regard to other matters. Accordingly, notwithstanding the authority delegated to the Texas Water Rights Commission by the Water Rights Adjudication Act of 1967,[134] the Austin Court of Appeals in *Nueces County Water Control and Improvement District No. 3 v. Texas Water Rights Commission,*[135] held that the commission could not *adjudicate* a water right dispute during a forfeiture proceeding.[136]

The Water Commission appears to have exceeded its statutory grant of authority by promulgating its developed water regulations in at least three respects. The expanded definition of state water and the requirement that an appropriator return its effluent to the source of supply conflicts with the legislative intent expressed in the Water Code. Section 11.046 only requires an appropriator to return surplus water when it is reasonably practicable to do so by gravity flow.[137] Water which has been used and processed by a municipality is not surplus water but is *used* water, which is not required to be returned to the source of supply.[138] State water loses its character as state water and becomes subject to disposition by the appropriator after the water is diverted and beneficially used for an authorized purpose, when the permit does not require used water to be returned to the source of supply.[139]

The imposition of water availability issues in water quality permit

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132. *See id.* arts. 6320, 6327; *see also* Galveston, H. & S. A. Ry. Co. v. Rodriguez, 288 S.W. 151, 152 (Tex. Comm'n App.—1926, judgmt adopted).

133. *See* Railroad Comm'n of Texas v. Atchison, Topeka, & Santa Fe R.R. Co., 609 S.W.2d 641, 644 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

134. *See* Water Rights Adjudication Act, 1967, ch. 45, 1967 Tex. Gen. Laws 86 (codified at TEX. WATER CODE ANN. §§ 11.302 to -.341 (Vernon Supp. 1986)).

135. 481 S.W.2d 924 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

136. *See id.* at 929.

137. *See* TEX. WATER CODE ANN. § 11.046 (Vernon Supp. 1986).

138. *See* Halsell v. Texas Water Comm'n, 380 S.W.2d 1, 7 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

139. *See supra* nn.24-27 and accompanying text.

hearings necessarily conflicts with the water quality permit requirements expressed in chapter 26 of the Water Code. The Water Commission may refuse to grant permits to discharge wastes into state water only if the commission finds that the issuance of the permit would violate state or federal law or would interfere with the purpose of chapter 26.[140] The commission is not authorized to reject a waste discharge permit if the method of discharge would impact downstream water availability.[141] The commission may prescribe in a waste discharge permit the duration of the permit, the location of the discharge point, the maximum quantity of waste that may be discharged, the character and quality of the waste, and any reporting and monitoring requirements that the commission deems necessary.[142] Following usual rules of construction, therefore, the commission is not authorized to consider water availability issues when reviewing waste discharge permit applications.

Other jurisdictional problems arise when the state attempts to regulate developed water, as when the Water Commission considers downstream water use requirements when it reviews wastewater discharge permits. Assume for example that a large Texas city such as San Antonio obtains its municipal water supply from groundwater sources. The city has always discharged its treated sewage effluent into a watercourse, but seeks to amend its discharge permit and sell its effluent for irrigation.[143] Water Commission rules now require the

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140. *See* TEX. WATER CODE ANN. § 26.027 (Vernon Supp. 1986) (effective upon delegation to Texas of the National Pollution Discharge Elimination System permit authority).

141. *See, e.g., id.* § 26.027 (issuance of permits and amendments for discharge of waste); *id.* § 26.029 (conditions of permit issuance); *id.* § 26.030 (effect on recreational water).

142. *See id.* § 26.029.

143. Of the state's ten largest municipal users of ground waters eight discharge their effluent into a state watercourse.

City	Volume of Ground-Water Pumped in 1983 (in acre feet)	Amount of Discharge (in million gallons per day)	Receiver of Discharge
Amarillo	26,270	18.55 MGD	Reused for Irrigation & Cooling
Beaumont	12,083	60.0 MGD	Hillebrandt Bayou
Bryan	10,790	2.5 MGD	Burton, Still & Turkey Creeks
El Paso	82,667	40 to 44 MGD	Rio Grande & Franklin Canal

commission to consider the effect of that discharge on downstream water rights and, presumably, the commission could deny the amendment and require the city to continue to discharge into the watercourse. Although the state retains the ability to regulate the discharge of effluent, including effluent originating from groundwater, the state possesses limited authority to regulate groundwater use.[144] The Water Commission thus would exceed its statutory authority by applying water availability criteria when it considers applications for beneficial use of treated sewage effluent originating from groundwater.

2. *Lower Colorado River Authority v. Texas Department of Water Resources*[145]—The Dilemma of "Unappropriated" Water

While rights of downstream appropriators of effluent and other return flows have been protected in a few states,[146] such has not been the case in Texas. Downstream appropriators are only entitled to water under the first in time, first in right principle.[147] A reclaiming

Houston	201,975	335 MGD	Houston Ship Channel
Lubbock	9,018	16.5 MGD	Reused for Irrgation & Cooling
Midland	11,586	3 MGD	Monahans Draw 18 MGD Irrigation
Odessa	8,827,189	5.83 MGD	Monahans Draw
San Antonio	170,497	150 MGD	San Antonio River
Victoria	9,030	6.5 to 7 MGD	Guadalupe River

Compiled from waste discharge permits and annual water use reports submitted to the Texas Water Commission pursuant to TEX. WATER CODE ANN. § 11.031 (Vernon Supp. 1986) (on file at Texas Water Commission).

144. Chapter 52 of the Water Code provides for the creation of underground water districts with powers to make and enforce rules providing for the conservation, preservation, protection, and recharge of underground water reservoirs. *See* TEX. WATER CODE ANN. §§ 52.021, -.101 (Vernon Supp. 1986). Private ownership rights of the owner of underground water, however, are expressly recognized and may not be impaired. *See id.* § 52.002 (Vernon 1972).

145. 689 S.W.2d 873 (Tex. 1984).

146. *See supra* nn. 46-75 and accompanying text. Colorado is in the minority. Most states recognize the rights of the developer.

147. *See* TEX. WATER CODE ANN. § 11.027 (Vernon Supp. 1986).

city therefore would have to meet the senior's call, either by discharging the needed amount of water or by foregoing some or all of its original diversion. Other water users would have to make claim either under the Water Code's permit mechanism or by prescription.

As observed by the Corpus Christi Court of Civil Appeals in *State v. Hidalgo County Water Conservation and Improvement District No. 18*,[148] "[t]he Texas Water Appropriation Acts were primarily intended to apply to free flowing streams. . . ."[149] The permitting provisions in the Water Code have no logical application to developed water. From a practical viewpoint, there is no significant market for developed water if there is water available in natural supply. The water user could obtain his own water right from the state. Yet, if there is only developed water available, the Water Commission is technically prevented from issuing permits to use that water.

The Water Commission only may issue permits to appropriate water if it finds that there is unappropriated water available in the source of supply.[150] The Texas Supreme Court defines unappropriated water as the amount of water remaining after taking into account all existing uncancelled permits and certified filings valued at their recorded level.[151] The Water Commission is not authorized to consider the amount of return flows when it determines whether there is unappropriated water under the supreme court's definition.

Theoretically, water development should be enhanced as investors are able to tell with the greatest possible certainty whether there will be a water supply available to them. To this end, the Texas Supreme Court mandated that the Water Commission grant permits only when there is unappropriated water in the supply as measured by the recorded or face value of all outstanding water rights.[152] Developed water, however, already is accounted for in that calculation under water rights representing the initial authority to appropriate water. The supreme court held that no new permits can be issued under these circumstances until existing water rights have been cancelled.[153]

Ownership rights in developed water cannot be cancelled under the

148. 433 S.W.2d 737 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

149. *Id.* at 737.

150. *See* TEX. WATER CODE ANN. § 11.134(b)(2) (Vernon Supp. 1986).

151. *See* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873, 874 (Tex. 1984).

152. *See id.* at 874.

153. *See id.* at 882.

Texas forfeiture statutes. Implicit in the concept of developed water is the premise that all requirements as to the initial appropriation of water have been satisfied. The water right under which that appropriation was made cannot be cancelled as to quantity, or, in other words, "vertically." Neither can the forfeiture statutes be interpreted to provide a "horizontal" cancellation procedure. Such a procedure would be exercised on a claim that because the appropriator has not for some time period made further use of its appropriated water, he has forfeited the opportunity to do so as to all amounts of water diverted by other downstream appropriators. The Texas statutes which provide for cancellation of water rights in whole or in part, are by their terms applicable only when water authorized to be diverted under a water right has not been put to beneficial use at any time during a ten-year period.[154] On the other hand, it is self evident in the concept of reusing or successively using water that it already has been beneficially used.

A concept related to forfeiture is that of abandonment. Water Code section 11.030 provides: "If any lawful appropriation or use of state water is willfully abandoned during any three successive years, the right to use the water is forfeited and the water is again subject to appropriation."[155] The intent to abandon is an essential element and it must be shown by clear and satisfactory evidence.[156] As noted by the Eastland Court of Civil Appeals:

> Abandonment may be shown by circumstances but the circumstances must disclose some definite act showing intention to abandon. The non-use of a right is not sufficient of itself to show abandonment but if the failure to use is long continued and unexplained, it gives rise to an inference of intention to abandon.[157]

Although the word "use" may have broad application, in the context of state water, section 11.030 has pertinence only to the initial diversion and beneficial use of water made under a water right. Abandonment has relevance to developed water only in the context of the release of particular molecules of water in a given instance.[158] *South*

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154. *See* TEX. WATER CODE ANN. §§ 11.173, -.178 (Vernon Supp. 1986).

155. *Id.* § 11.030.

156. *See* City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3, 540 S.W.2d 357, 375 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

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

158. *See* Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 62, 13 Cal. 2d 343, 350 (1939)

Texas Water Co. v. Bieri presented an instance when the developer of water did not offer evidence that drainage water was in any manner under its control or in its possession, thus its claim to rights in that water failed.[159] There is no legal concept which recognizes or provides that the right to use reclaimed water in the future may be abandoned.

The Texas Water Commission recently has taken the view that *Lower Colorado River Authority v. Texas Department of Water Resources* has no application to temporary permits issued under Water Code section 11.138, and, therefore, it can issue new time-limited permits for diversions from streams already fully appropriated on paper.[160] Under this concept, the commission could issue permits for a term of years or perhaps perpetual permits based upon the amount of developed water historically returned to the source of supply. Even should such a view prevail, assertions of state authority over developed water cannot by-pass the admonition in *Guelker* that the water governing authority lacks jurisdiction in this matter and lacks statutory authority to compel the discharge of used water into the source of supply.[161]

It also is difficult to comprehend how a downstream appropriator could claim returned wastewater by prescription. The fact that water rights can be lost by prescription was acknowledged long ago by the Texas Supreme Court.[162] It follows that ownership of water once diverted could similarly be lost. To constitute adverse possession sufficient to deprive an owner of legal title to his property, "[s]uch possession must be continuous and uninterrupted for the statutory period, and must be actual, notorious, distinct and hostile, and of such

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("Past abandonment by defendant of certain water, as distinguished from a water right, has not conferred upon plaintiffs any right to compel a like abandonment in the future."). The court also drew a distinction between the right to end the use of water and the right to end the release of excess water while the original use is continued.

159. *See* South Texas Water Co. v. Bieri, 247 S.W.2d 268, 273 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.).

160. *Cf.* TEX. WATER CODE ANN. § 11.138(a) (Vernon Supp. 1986). This section authorizes the Water Commission to issue temporary permits "for beneficial purposes to the extent that they do not interfere with or adversely affect prior appropriations or vested rights on the stream from which water is to be diverted under such temporary permits." *Id.* § 11.138(a). Temporary permits may not be issued for a duration greater than three years and do not vest in their holders a permanent right to the use of water. *See id.* §§ 11.138(d), (e).

161. *See* Guelker v. Hidalgo County Water Improvement Dist. No. 6, 269 S.W.2d 551, 555 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

162. *See* Baker v. Brown, 55 Tex. 377, 379 (1881).

character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant."[163] Each of these elements must be present, and the adverse claimant must prove each unequivocally.[164] Downstream dependency on return flow may be continuous and actual, and may indicate a claim of right, but it cannot be hostile if the upstream appropriator has no duty to continue his discharge of used water.

Water that is used with the permission of the owner, or the use of excess water when not needed by him, is a mere license, is not adverse or hostile, and is insufficient to create the basis of a prescriptive right.[165] In *Mud Creek Irrigation, Agricultural and Manufacturing Co. v. Vivian,*[166] the plaintiff did not acquire title by prescription because the defendants "could not have prevented or interrupted the use of the water by plaintiff by any legal proceedings, because it in no manner affected their rights."[167] More recently, the Corpus Christi Court of Civil Appeals adopted as a principal that "prescription does not run upstream."[168]

3. Retroactive Effect of Developed Water Rules

Article 1, section 16 of the Texas Constitution prohibits enactment of any retroactive law or other law impairing the obligations of contracts.[169] A retroactive law is one which destroys or impairs existing vested rights, creates new obligations, imposes new duties, or otherwise affects rights accruing prior to enactment of the statute.[170] The courts' opinions with regard to retroactive statutes can be characterized as follows: the challenged statute is impermissible because it impairs a vested right, the statute impairs a vested right but a reasonable time to protect the right was provided, or the statute, although retro-

163. Heard v. State, 146 Tex. 139, 141, 204 S.W.2d 344, 347-48 (1947).

164. *See* City of Corpus Christi v. Nueces County Water Improvement Dist. No. 3, 540 S.W.2d 357, 375 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

165. *See* Motl v. Boyd, 116 Tex. 82, 126, 286 S.W. 458, 476 (1926).

166. 74 Tex. 170, 11 S.W. 1078 (1889).

167. *Id.* at 176, 11 S.W. at 1079; *see also* Houston Trans. Co. v. San Jacinto Rice Co., 163 S.W. 1023, 1025 (Tex. Civ. App.—El Paso 1914, no writ).

168. *See* City of Corpus Christi v. Nueces County Water Improvement Dist. No. 3, 540 S.W.2d 357, 376 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

169. *See* TEX. CONST. art. I, § 16.

170. *See* Turbeville v. Gowdy, 272 S.W. 559, 561 (Tex. Civ. App.—Fort Worth 1925, no writ).

active, was remedial in nature or did not otherwise affect a vested right.

The article I, section 16 protection against governmental actions which impair the obligations of contracts is directed toward those statutes which release a party from a duty imposed by an existing contract, or otherwise results in a material change, modification, or impairment of the rights and obligations created by the contract.[171] For example, the courts have declared invalid legislative enactments which attempt to expand the coverage included in existing insurance policies,[172] affect the redemption powers of bond holders,[173] create a lien in favor of a hospital which provides services prior to the effective date of the statute,[174] or apply an amended consumer credit protection statute to an existing consumer credit contract.[175]

Although a permit is considered to represent a usufructuary right, a permit also can be characterized as a contractual arrangement between the state and the permittee. Mutual promises are made and reciprocal rights and obligations are created. One such promise which has historically been implicit in a permit authorizing the diversion and use of state water is that the appropriator acquires the right of control over and use of his developed water. Although the state may impose limitations upon that right when the permit is granted, the state may not retroactively expand those limitations by impairing or materially changing the contractual rights and obligations created by the permit.

Although the United States Constitution only prohibits the enactment of ex post facto laws or laws which impair an existing contractual obligation, Texas bans any law which would have a deleterious impact upon an existing vested right. A vested right is more than just a property right, it may be any "well-founded" claim recognized or secured by law, and the Texas Constitution protects public rights as

171. *See* Luter v. Hunter, 30 Tex. 689, 694-95 (1868); *see also* TEX. CONST. art. I, § 16, interpretive commentary (Vernon 1984).

172. *See* French v. Insurance Co. of N. Am., 591 S.W.2d 620, 622 (Tex. Civ. App.—Austin 1979, no writ).

173. *See* Norton v. Kelberg County, 149 Tex. 261, 263, 231 S.W.2d 716, 718 (1950).

174. *See* Heights Hosp., Inc. v. Patterson, 269 S.W.2d 810, 812 (Tex. Civ. App.—Waco 1954, writ ref'd).

175. *See* Ford Motor Credit Co. v. Zapata, 605 S.W.2d 362, 364-65 (Tex. Civ. App.—Beaumont 1980), *rev'd on other grounds,* 615 S.W.2d 198 (Tex. 1981).

well as private interests.[176]

Sometimes legislative action may apply retrospectively and affect vested rights but still be considered a valid exercise of the state's power. The fact that a statute operates to change conditions and legal rights existing prior to the effective date of the statute is not necessarily unconstitutional, provided the affected parties were afforded a reasonable time to protect their interests.[177] Additionally, as noted by the supreme court in *Texas Water Rights Commission v. Wright,* a statute which provides for the forfeiture of vested rights will not be unconstitutional if the holder of that right might reasonably expect enforcement of conditions inherently attached to those rights.[178] An important consideration in upholding or striking down a retroactive statute is whether the bona fide intentions or reasonable expectations of the contracting parties is defeated or effectuated.[179] The courts have also recognized that article F, section 16 of the Texas Constitution does not bar all statutes which are retroactive in operation, if the legislation does not impact a vested right,[180] is remedial in nature,[181] or is a valid exercise of the state's police power.[182]

In measuring the effect of the rules regulating developed water, it is clear that these rules act retrospectively and severely impact vested rights, as well as impair existing contractual obligations between the state and appropriator. Whether the right to use developed water is based upon a usufructuary right or an ownership interest, an appro-

176. *See* Mellinger v. City of Houston, 68 Tex. 37, 45, 3 S.W. 249, 253 (1887).

177. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648 (Tex. 1971); Pecos Mercantile Co. v. McKnight, 256 S.W. 933, 936 (Tex. Civ. App.—El Paso 1923, writ ref'd).

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

179. *See id.* at 649; *see also* Smith, *Retroactive Laws and Vested Rights,* 6 TEXAS L. REV. 409, 427 (1928).

180. *See* Coley v. Texas Dep't of Public Safety, 348 S.W.2d 267, 269 (Tex. Civ. App.—Fort Worth 1961, no writ) (license or permit to drive is a privilege and not vested right, thus habitual offender law which considered traffic offenses that occurred prior to effective date of statute not unconstitutional); Kissick v. Garland Indep. School Dist., 330 S.W.2d 708, 711 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (opportunity to play high school football and potential college athletic scholarship are not vested rights).

181. *See* Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (relating to retroactivity of statute which raised age limit of children whose parents are responsible for their tortuous acts); Slate v. Fort Worth, 193 S.W. 1143, 1144 (Tex. Civ. App.—El Paso 1917, no writ) (relating to statute granting cause of action against municipal corporation).

182. *See* State Bd. of Registered Professional Eng'rs, 504 S.W.2d 606, 609 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (legislature has continuing right pursuant to its police power to amend statutes regulating business corporations in Texas).

priator's ability to use his developed water is a vested right, well within the scope of interests protected by the constitutional prohibition against retroactive laws. This is not to say that the right to developed water is beyond any governmental regulation. There is no doubt that the right to use developed water is limited to beneficial and non-wasteful uses. Pursuant to its police power, the state may also regulate the use of developed water as necessary to protect the public interest. Such regulation should be reasonable, however, for an appropriator may legitimately expect that rights of use, such as those provided by the doctrine of developed water, apply throughout the duration of his permit. Thus, the regulations which restrict the right to use developed water cannot be applied to permits issued prior to the date the rules were promulgated unless the permit at the time issued specified otherwise.

The rules restricting the right of an appropriator to use his developed water cannot be said to be merely remedial in nature. A remedial statute is one enacted to afford a remedy, or to improve and facilitate remedies already in existence, or one intended for the correction of defects, mistakes, and omissions in the civil institutions and administrative policy of the State.[183] The cancellation statutes analyzed in *Texas Water Rights Commission v. Wright,* for example, were considered to be remedial in nature because they were intended to provide for enforcement of a condition inherently attached to water rights.[184] A restriction on the right to use developed water is not such a condition. Neither are the developed water regulations purely procedural in nature, such as statutes relating to judicial or administrative procedures. But even though procedural statutes may be retroactive, they may not be given retrospective application if to do so would destroy or impair rights that had become vested before the statute became effective. Thus, the recent regulations adopted by the Texas Water Commission in regulating the use of developed water, although ostensibly procedural in nature, significantly impair the rights of the developer and raise serious constitutional issues.

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183. *See* Pratt v. Story, 530 S.W.2d 325, 328 (Tex. Civ. App.—Tyler 1975, no writ); Slate v. City of Fort Worth, 193 S.W. 1143, 1144 (Tex. Civ. App.—El Paso 1917, no writ).

184. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 649-50 (Tex. 1971); TEX. REV. CIV. STAT. ANN. art. 7519a (repealed 1971) (provisions relating to cancellation of a permit for ten year non-beneficial use are now contained in TEX. WATER CODE ANN. §§ 11.171 to -.186 (Vernon Supp. 1986)).

IV. PROPOSED LEGISLATION

Historically, the public policy of Texas has been to encourage reuse of return flow/developed water, in order to reduce the demand for unappropriated state water and to preserve the quality of the environment. This policy was reaffirmed by the passage of House Bill 2 which emphasized conservation techniques to increase the recycling and reuse of water.[185] The rules restricting the right to use developed water, in addition to raising serious jurisdictional and constitutional issues, contradict this public policy. Legislation was proposed, but defeated during the 1985 legislative session, which would provide a statutory basis for regulating reuse of developed water. This legislation would have also voided those portions of the Water Commission's rules which seek to equate return flow with unappropriated water under circumstances where an appropriator seeks authorization to use the water before it is abandoned into a watercourse.

Senate Bill 990 and House Bill 1749 were identical companion bills which recognized that the reuse of developed water was consistent with the need for maximum conservation of state water. Developed water was defined as state water lawfully diverted and beneficially used, but not consumed as a result of that use. The Water Commission would have been authorized to issue amendments to the water rights of cities and other political subdivisions authorizing the reuse of developed water, with reuse to be considered a part of the original water right and not a new appropriation of state water.[186]

Finally, the proposed legislation also would have authorized the Water Commission to issue an amendment to the water right of a city, town, or political subdivision to divert additional water from a watercourse or reservoir provided that developed water from these additional diversions was returned to the watercourse or reservoir.[187] Such an exchange of developed water for state water would not involve an additional appropriation of water or deplete the supply of available unappropriated water where, as was required in the bills, the additional diversions are equal to or less than the amount of devel-

185. Act of May 23, 1985, ch. 133, § 1.09, 1985 Tex. Sess. Law Serv. 630, 635 (Vernon) (codified at TEX. WATER CODE ANN. § 1134 (Vernon Supp. 1986)). House Bill 2 became effective upon passage in November, 1985 of the constitutional amendments which were proposed by Tex. H.R.J. 6, 69th Leg., 1985 Tex. Sess. Law Serv. A-100 (Vernon).

186. *See* S.B. 990, § 1, 69th Leg. (1985); H.B. 1749, § 1, 69th Leg. (1985).

187. *See* S.B. 990, § 1, 69th Leg. (1985); H.B. 1749, § 1, 69th Leg. (1985).

oped water returned to the watercourse or reservoir. In the past, the Commission has recognized such exchanges of water when private groundwater is added to the watercourse to offset the effect of diversions from the watercourse.

The concept of such exchanges has been recognized in other jurisdictions. In *State v. American Fruit Growers, Inc.*,[188] the Supreme Court of Washington held that where a riparian owner, entitled to use seepage water, permitted it to augment flow in a creek, he may take an equal amount of water at a point higher up the creek provided he did not interfere with the rights of others.[189] The court reasoned that it would be just and equitable to allow him to take an equal amount of water from the creek at a point from which it can be taken by gravity, rather than requiring him to take the seepage developed waters at the point they enter the creek and pump them back up to his land by mechanical means at a great expense.[190]

V. CONCLUSION

The concept of developed water emphasizes the conservation of the state's water resources and the enhancement of water quality. The state in administering its water resources is under a constitutional duty to conserve water as a precious resource, but administrative rules which discourage water reuse will not further such conservation. The Texas Water Commission should be allowed to regulate the use and manner of disposal of developed water, but these rules should not impair or destroy vested rights to use developed water.

188. 237 P. 498 (Wash. 1925).
189. *See id.* at 500.
190. *See id.* at 500.