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Retroactive Laws and Water Rights: Texas Water Rights Commission v. Wright

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Retroactive Laws and Water Rights: *Texas Water Rights Commission v. Wright*

The Texas Board of Water Engineers issued permits in 1918 and 1928 authorizing certain permittees to divert water from the Rio Grande River. The permittees diverted water under the two permits until a flood washed out the pumps in 1954. Thereafter, no water was diverted. In 1957 the Texas Legislature, by amending article 7519a,[1] directed the Water Board to revoke a water permit if no water had been put to beneficial use under the permit for ten consecutive years preceding the effective date of the statute or the date of cancellation proceedings. In 1967, after notice and hearing, the Texas Water Commission[2] cancelled the two permits. Permittees contended that article 7519a operated retroactively upon their vested rights and was thus unconstitutional. The court of civil appeals agreed.[3] *Held, reversed*: Article 7519a is a valid retroactive law since it provides a reasonable remedy to enforce conditions inherently attached to the water rights when granted. *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. 1971).

I. From Rule of Construction to Constitutional Limitation

The aversion to retroactive laws appeared along with the earliest formulations of legal principles. The Roman Code contained a provision that laws should apply prospectively unless expressly made retroactive.[4] The English courts associated retroactive laws with injustice[5] and adopted this principle from Roman law.[6] But the principle remained a rule of statutory construction and did not limit the power of Parliament to enact retroactive laws.

In America the aversion to retroactive laws appeared as a limitation on legislative power as well as a rule of construction.[7] The United States Constitution expressly forbids Congress to pass ex post facto laws, or bills of attainder,[8] and forbids the states to pass ex post facto laws, bills of attainder, or laws which impair the obligation of contracts.[9] In *Calder v. Bull*[10] the Supreme Court initially limited the ex post facto clause to retroactive criminal laws. Faced with

[1] Ch. 39, § 1, [1957] Tex. Laws 82 (recodified at TEX. WATER CODE ANN. §§ 5.173-.177 (1971).

[2] The name of the Board of Water Engineers was changed to the Texas Water Commission in 1962. Ch. 4, § 1, [1962] Tex. Laws 3d Called Sess. 10. The name of the Texas Water Commission was changed to Texas Water Rights Commission in 1965. Ch. 296, § 3, [1965] Tex. Laws 583. *See* TEX. REV. CIV. STAT. ANN. art. 7477 (1954).

[3] Wright v. Texas Water Rights Comm'n, 445 S.W.2d 32 (Tex. Civ. App.—Austin 1969).

[4] CORPUS JURIS CIVILIS, CODE 1.14.7.

[5] Retroactive laws are considered unjust for three reasons: (1) they disturb the security of the past; (2) they can be passed with precise knowledge of the persons and conditions affected; and (3) they deny the individual affected the opportunity to regulate his conduct to avoid the consequences.

[6] Bracton originally introduced this principle into the common law, but Coke borrowed the principle from Bracton and phrased the legal maxim that "Regularly Nova constitutio futuris formam imponere debet non praeteritis." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 777 (1936).

[7] American courts recognize that in the absence of clear intent to the contrary, statutes are to be applied prospectively. *See, e.g.*, Dash v. Van Kleeck, 7 N.Y. 477 (1811).

[8] U.S. CONST. art. I, § 9.

[9] *Id.* art. I, § 10.

[10] 3 U.S. (3 Dall.) 386 (1798).

this limitation, the Court developed at least two ways to invalidate unreasonable retroactive civil laws: (1) by expanding the coverage of the contract clause;[11] and (2) by reaching beyond the Constitution and invalidating retroactive civil laws which violate "natural law."[12] But the Court held that the federal constitution did not limit state power to enact retroactive civil legislation.[13]

Later the courts began to utilize the fourteenth amendment to circumscribe state power to enact retroactive laws.[14] A retroactive law may be held unconstitutional if it violates due process[15] or impairs a vested right.[16] General definitions of a vested right do not provide a guide for courts in specific cases because "vested right" is merely a label attached after analysis and weighing of public and private interests.[17] Therefore, a vested right is an interest which in the opinion of the court is constitutionally protected under the guarantee of due process.

The number of cases holding retroactive laws invalid has dwindled in recent years. Condemnation of all retroactive legislation has been replaced by statements that retroactivity is not inherently bad.[18] Nonetheless, several states have enacted constitutional provisions prohibiting all retroactive laws.[19] The validity of a retroactive law is usually judged by the same standards under a due process clause or an express provision,[20] but it has been held that decisions under constitutions forbidding retroactive laws are not pertinent in a state having no such provision.[21]

[11] *See* Pacific Mail S.S. Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1864); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[12] Decisions holding retroactive laws invalid on the basis of "natural law" uniformly combined "natural law" with a specific constitutional provision. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Inhabitants of Goshen v. Inhabitants of Stonington, 4 Conn. 209 (1822).

[13] As stated in Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829): "[R]etrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not condemned or forbidden by any part of that instrument [the constitution]." *See also* Baltimore & S.R.R. v. Nesbit, 51 U.S. (10 How.) 395 (1850).

[14] Some state courts had already brought retroactive laws within the due process clauses of their state constitutions. *See, e.g.*, Westervelt v. Gregg, 12 N.Y. 202 (1854); Wales v. Stetson, 2 Mass. 143 (1806).

[15] A retroactive law may violate due process by denying notice and opportunity for a hearing. Ochoa v. Hernandez y Morales, 230 U.S. 139 (1912).

[16] Some writers suggest that the vested rights limitation is the "natural law" doctrine "flourishing under the disguise of 'due process.'" J. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 11 (1953). *See also* Smith, *Retroactive Laws and Vested Rights*, 5 TEXAS L. REV. 231 (1927).

[17] *E.g.*, past acts can be made a ground of divorce, Elliott v. Elliott, 38 Md. 357 (1873). *Contra*, Clark v. Clark, 10 N.H. 380 (1839). A deed can be retroactively cured, Johnson v. Taylor, 60 Tex. 360 (1883). *Contra*, Shonk v. Brown, 61 Pa. 320 (1869). Claims barred by the statute of limitations can be revived, Campbell v. Holt, 115 U.S. 620 (1885). *Contra*, Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249 (1887).

[18] *Compare* Dash v. Van Kleeck, 7 N.Y. 477 (1811), *with* Caruthers v. Board of Adjustment, 290 S.W.2d 340 (Tex. Civ. App.—Galveston 1956).

[19] COLO. CONST. art. II, § 2; GA. CONST. art. I, § 3; LA. CONST. art. IV, § 15; MO. CONST. art. I, § 13; N.H. CONST. pt. I, art. 23; OHIO CONST. art. II, § 28; TENN. CONST. art. I, § 20; TEX. CONST. art. I, § 16.

[20] Since retroactivity is not objectionable per se, the validity of a retroactive statute is determined by its effect under both due process and an express constitutional provision. *See* Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949); Kelly v. Republic Bldg. & Loan Ass'n, 34 S.W.2d 924 (Tex. Civ. App.—Dallas 1930). Some courts indicate that the express prohibition of retroactive laws in their state constitution creates a presumption of invalidity while under due process alone there is a presumption of validity. Leete v. State Bank, 115 Mo. 184, 21 S.W. 788 (1893); Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249 (1887).

[21] State *ex rel.* Jacksonville Gas Co. v. Lee, 112 Fla. 109, 150 So. 225 (1933),

II. VESTED WATER RIGHTS AND RETROACTIVE LAWS

Vested Rights. In *Mellinger v. City of Houston* the Texas Supreme Court defined a vested right as "a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law."[22] This definition includes all vested rights, not just property rights, and protects rights not guaranteed by other constitutional provisions.[23] To determine whether a particular right is "vested" the Texas courts have traditionally looked to property law and prior decisions.[24] Therefore, the courts have generally limited analysis to the nature of the right involved and have not weighed public and private interests in the individual case.

The Texas Constitution expressly forbids all retroactive laws,[25] but this provision has been construed to prohibit only retroactive laws that impair vested rights.[26] Texas decisions recognize that no one can have a vested right to a particular remedy, but a statute that impairs a remedy is invalid if it prevents or seriously impairs enforcement of a vested right.[27] Thus, the legislature may shorten the statute of limitations period as long as the plaintiff has notice and opportunity for a hearing on his claim.[28] Likewise, a retroactive law that provides a remedy for an existing nuisance or wrong is constitutional,[29] but the legislature cannot revive claims that have already been barred by the statute of limitations.[30]

Protection of Vested Water Rights Against Retroactive Laws. The two doctrines governing the right to use water in Texas are the appropriation doctrine and the riparian doctrine. Both riparian and appropriative rights are merely rights to use water,[31] and ownership of the corpus of the water remains in the state.[32] The riparian right attaches to land contiguous to a watercourse solely

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[22] 68 Tex. 37, 39, 3 S.W. 249, 253 (1887).

[23] *Id.*

[24] *See, e.g.*, Norton v. Kleberg County, 149 Tex. 261, 231 S.W.2d 716 (1950); Gossett v. Hamilton, 133 S.W.2d 297 (Tex. Civ. App.—Fort Worth 1939), *error dismissed, judgment correct.*

[25] TEX. CONST. art. I, § 16.

[26] McCain v. Yost, 155 Tex. 174, 284 S.W.2d 898 (1955). Texas decisions generally borrow Justice Story's definition of a retroactive law: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." Society for the Propagation of the Gospel in Foreign Parts v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (C.C.D.N.H. 1814).

[27] Paschal v. Perez, 7 Tex. 348 (1851); DeCordova v. Galveston, 4 Tex. 470 (1849). Conversely, Texas courts have allowed retroactive supplying of a remedy to enforce, rather than impair, a "right" that theretofore had no remedy for enforcement. Fristoe v. Blum, 92 Tex. 76, 45 S.W. 998 (1898); Johnson v. Taylor, 60 Tex. 360 (1883).

[28] Bunn v. City of Laredo, 245 S.W. 426 (Tex. Comm'n App. 1922), *judgment adopted*; Pecos Mercantile Co. v. McKnight, 256 S.W. 933 (Tex. Civ. App.—El Paso 1923), *error ref.*

[29] Standifer v. Wilson, 93 Tex. 232, 54 S.W. 898 (1900). Land purchased under a law requiring judicial decree for forfeiture could be forfeited by the commissioner of the general land office under a later law. Sutherland v. De Leon, 1 Tex. 250, 305 (1846), states that a retroactive law would be giving a right where none existed, but if the right already exists the legislature has the power to devise and provide a remedy.

[30] Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249 (1887).

[31] TEX. REV. CIV. STAT. ANN. art. 7542 (1954); Zavala County Water Irrigation Dist. No. 3 v. Rogers, 145 S.W.2d 919 (Tex. Civ. App.—El Paso 1940).

[32] TEX. REV. CIV. STAT. ANN. art. 7467 (1954).

because of the location of the land;[33] therefore, a riparian right is a vested real property right appurtenant to the land which it benefits.[34] The riparian owner is entitled to use the water for reasonable domestic and household purposes,[35] but the right does not depend on use of the water.[36] An appropriative right is obtained by diverting the water and putting it to beneficial use.[37] Water may be appropriated for use on lands which are not contiguous to the water supply, but the right may be lost by nonuse.[38] A permit to appropriate is merely a license and does not ripen into a property right until the appropriated water has been put to beneficial use.[39] But after the water has been beneficially used for the proposed purposes, the appropriative right is a vested right protected by the constitution.[40]

The Texas courts have been vigilant to safeguard water rights from impairment by the legislature. In *Motl v. Boyd*[41] the Texas Supreme Court concluded that the water appropriation acts from 1889 to 1917 were valid only so far as they authorized the appropriation of water without violation of riparian rights. The 1917 Water Act[42] was also held unconstitutional because it empowered the Water Board to determine the ownership of vested water rights.[43] The appropriative rights acquired under the 1895 Irrigation Act[44] could not be cancelled for failure to record under a later law.[45] Likewise, a law making it unlawful to continue diversion of water[46] was declared to be retroactive and unconstitutional because it was construed to compel an appropriator to remove a lawfully constructed dam.[47]

Although an appropriative right is a vested right to use water, it is "not a fixed and absolute estate, but, instead, is a defeasible interest, which never comes to rest, but is always at the risk of loss by unjustifiable delay in making or continuing beneficial use thereof."[48] The 1895 water law required beneficial

[33] Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905).

[34] W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 303 (1961). Mud Creek Irrigation, Agriculture & Mfg. Co. v. Vivian, 74 Tex. 170, 111 S.W. 1073 (1889).

[35] Valmont Plantations v. State, 163 Tex. 381, 355 S.W.2d 502 (1962). The Texas Supreme Court adopted the opinion of the court of civil appeals in State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961).

[36] W. HUTCHINS, *supra* note 34, at 303.

[37] The steps necessary to perfect a water appropriation are prescribed by statute. *See* TEX. REV. CIV. STAT. ANN. arts. 7492, 7474 (1954). An appropriator must have a permit to appropriate, must construct the proposed works within a reasonable time, and must apply the water to beneficial use within a reasonable time.

[38] "In the appropriation of water, there cannot be any 'dog in the manger' business . . . when no beneficial use of the water is or can be made . . . ." Union Mill & Mining Co. v. Dangberg, 81 F. 73, 119 (C.C.D. Nev. 1897).

[39] Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).

[40] Clark v. Briscoe Irrigation Co., 200 S.W.2d 674 (Tex. Civ. App.—Austin 1947).

[41] 116 Tex. 82, 286 S.W. 458 (1926).

[42] Canales Act of 1917, ch. 88, [1917] Tex. Laws 211.

[43] Board of Water Eng'rs v. McKnight, 111 Tex. 82, 229 S.W. 301 (1921). *But see* Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945), which upheld a statute giving the Railroad Commission the power to determine the ownership of oil and gas rights. The court held that the oil and gas statutes were constitutional when construed in light of the Texas conservation amendment adopted after the holding in *McKnight*.

[44] Ch. 21, [1895] Tex. Laws, 10 H. GAMMEL, LAWS OF TEXAS 21 (1898).

[45] Board of Water Eng'rs v. Slaughter, 382 S.W.2d 111 (Tex. Civ. App.—San Antonio 1964), *error ref. n.r.e.*, 407 S.W.2d 467 (Tex. 1966).

[46] Ch. 7, [1915] Tex. Laws 1st Called Sess. 17.

[47] Gaertner v. Stolle, 238 S.W. 252 (Tex. Civ. App.—Galveston 1922), *error ref.*

[48] El Paso County Water Improvement Dist. No. 1 v. El Paso, 133 F. Supp. 894, 905 (W.D. Tex. 1955), *modified*, 243 F.2d 927 (5th Cir.), *cert. denied*, 355 U.S. 820 (1957).

use of appropriated water, but set no procedure or time for forfeiture upon nonuse.[49] The 1917 law provided two methods for loss of a water appropriation: (1) article 7519[50] authorized the Water Board to cancel a permit when the permittee failed to perfect the water right;[51] and (2) article 7544[52] required forfeiture of a perfected water right after three years of willful abandonment.[53] Although loss of a water appropriation under article 7519 did not require proof of intent to abandon, the article applied only to unperfected water rights.[54] Until passage of article 7519a in 1957, a perfected water right could be lost *only* upon nonuse for three years and proof of intention to abandon.

III. TEXAS WATER RIGHTS COMM'N V. WRIGHT

In *Texas Water Rights Comm'n v. Wright*[55] the Texas Supreme Court upheld a retroactive law despite the express provision in the Texas Constitution prohibiting retroactive laws. Article 7519a was literally retroactive because it applied to conduct, in this instance non-conduct, occurring before passage of the act.[56] The court conceded that article 7519a was also retroactive in the constitutional sense because it provided a new basis for loss of water rights acquired under prior laws. The court construed the statute to require a conclusive presumption of abandonment after ten years of nonuse. Therefore, article 7519a impaired an existing right by providing a much stricter and more nearly absolute procedure for loss of a water right than the existing abandonment statute.[57]

In reaching its decision the Texas Supreme Court pursued two lines of reasoning. First, it employed public policy to attach an "inherent condition" of continued use to existing water rights. Secondly, it attempted to use the nomenclature of "vested rights" and "remedies" to uphold article 7519a even though existing precedent did not support the result. In upholding article 7519a the court disregarded the reasoning of a Nevada Supreme Court decision[58] which is the only case that had discussed the problem of applying a retroactive forfeiture statute to "vested" water rights. In effect the court simply balanced public interest and private rights to justify impairing a "vested right" without acknowledging this approach as the basis for its decision.

The court first recognized that under prior decisions a perfected water right is a vested right. Traditionally, determination that a law impairs a vested right settled the unconstitutionality of the law,[59] but the court maintained that this

[49] Ch. 21, §§ 1, 4, [1895] Tex. Laws, 10 H. GAMMEL, LAWS OF TEXAS 21 (1898).

[50] TEX. REV. CIV. STAT. ANN. art. 7519 (1954).

[51] *See* note 37 *supra*. The permit is merely a license to appropriate water and does not ripen into a property right until the appropriator initially applies the water to beneficial use. Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).

[52] TEX. REV. CIV. STAT. ANN. art. 7544 (1954).

[53] Article 7544 has been construed as an abandonment statute requiring proof of intent to abandon by clear and satisfactory evidence. City of Anson v. Arnett, 250 S.W.2d 450 (Tex. Civ. App.—Eastland 1952), *error ref. n.r.e.*

[54] *See* TEX. REV. CIV. STAT. ANN. art. 7474 (1954).

[55] 464 S.W.2d 642 (Tex. 1971).

[56] Six months of the 10-year span of nonuse resulting in forfeiture of the permits occurred prior to the statute's effective date.

[57] TEX. REV. CIV. STAT. ANN. art. 7544 (1954).

[58] *In re* Manse Springs & Its Tributaries, 60 Nev. 280, 108 P.2d 311 (1940).

[59] *E.g.*, Norton v. Kleberg County, 149 Tex. 261, 231 S.W.2d 716 (1950); Spires v. Mann, 173 S.W.2d 200 (Tex. Civ. App.—Eastland 1943); Gossett v. Hamilton, 133 S.W.2d 297 (Tex. Civ. App.—Fort Worth 1939).

particular vested right depended on continued beneficial use of the appropriated water. The court called beneficial use a condition inherently attached to a permit because article 7542 defines a water right as the right to use water for *beneficial purposes.*[60] The court read the water appropriation statutes in light of the Texas conservation amendment[61] and found an implied condition of continued use attached to the water rights when granted.[62] The state as the owner of the corpus of the water[63] had a right to enforce this inherent condition. Since nonuse of water is waste[64] and waste is against the public policy of the state, the state had both the right and the duty to supply a remedy for nonuse.

The court recognized that the legislature could not retroactively supply a remedy if it impaired a vested right, but in the court's opinion article 7519a did not impair a vested right because it provided a fair and reasonable remedy to enforce a condition attached to the right when granted. The court employed three tests to determine the reasonableness of applying article 7519a to existing water rights: (1) whether the retroactive law gave effect to or defeated the reasonable expectations of the persons affected;[65] (2) whether anyone had changed his position or omitted to change it in reliance upon the law in force;[66] and (3) whether the statute had become a likely basis for substantial reliance by people who may have changed their positions to reap its benefits.[67] The court reasoned that since a water right is merely the right to use the water of the state, the permittees could have expected the state to protect its interest in the water by providing a remedy for nonuse. Moreover, the court pointed to the nine and one-half years that the permittees had to protect their interests. Therefore, the permittees could not have reasonably relied on the existing abandonment statute or changed their position to reap its benefits. The court concluded that the permittees could not claim they were surprised when the state required forfeiture of their appropriative rights for nonuse.

The opinion confused a continuing duty to use water under a perfected water right with the condition subsequent originally attached to the permit.[68] Article 7519 recognized the condition subsequent originally attached to a water permit

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[60] TEX. REV. CIV. STAT. ANN. art. 7542 (1954).

[61] TEX. CONST. art. XVI, § 59(a).

[62] In Clark v. Briscoe, 200 S.W.2d 674 (Tex. Civ. App.—Austin 1947), the court used similar reasoning to allow the Board of Water Engineers to supervise any change in use or place of use of appropriated water. The court in *Clark* conceded that if the permittees had acquired an absolute right to change the purpose and place of use of the water at the time their right vested, the legislature could not thereafter impair that right. The court held that the permittees acquired only the vested right to change the place of use, subject to the control of the legislature. But in *Clark* the court pointed out: "All of the statutes governing the exercise of the rights acquired under the appropriation were . . . in effect at the time the application was granted, and their requirements entered into and became ingredient elements of those rights, affecting their future exercise." *Id.* at 683.

[63] TEX. REV. CIV. STAT. ANN. art. 7467 (1954).

[64] *Id.* art. 7472c.

[65] *See* Smith, *supra* note 16, at 427.

[66] *See* Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30 (1930).

[67] *See* Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 566 (1956).

[68] The court cites Hickman v. Loup River Pub. Power Dist., 176 Neb. 416, 126 N.W.2d 404 (1964), and Hagerman Irrigation Co. v. McMurry, 16 N.M. 172, 113 P. 823 (1911), to support its conclusion, but these decisions concern the use of water to complete the appropriation.

and provided for forfeiture upon failure initially to apply water to beneficial use.[69] The permittees could expect to lose their appropriative rights for nonuse, but only upon the conditions attached to the rights when acquired. Since article 7474[70] explicitly limited loss by forfeiture to unperfected water rights, the permittees could have reasonably believed that article 7519a did not apply to their perfected water rights. Thus, it seems apparent that the court relied on public policy expressed in the conservation amendment to attach retroactively the inherent condition of beneficial use to existing water rights.

In upholding application of article 7519a to existing water rights the Texas Supreme Court refused to follow *In re Manse Springs and Its Tributaries*.[71] The Nevada court in *Manse Springs* concluded that no compelling state interest justified the impairment of vested water rights because the existing abandonment statute provided a procedure for forfeiting water rights upon nonuse. Although abandonment required proof of intent, the court emphasized that the duration of nonuse and the public interest in preventing waste would be considered.[72] Furthermore, the court added that even under mandatory forfeiture statutes mitigating circumstances are a defense, and the passage of a statutory period without any use of water does not automatically forfeit the right.[73] The Texas court pointed out that the Nevada statute required only five years of nonuse, whereas article 7519a required ten years for loss of a water right. Therefore, the additional five years provided a stronger basis for the conclusive presumption of abandonment. Finally, the court dismissed the decision in *Manse Springs* as representing the rule only in Nevada.[74]

In *Wright* the Texas Supreme Court disguised the balancing of statutory objectives and individual rights with the catchwords of "vested rights" and "remedies." The court admitted that the meaning of the term "vested right" was unclear, but continued to label an appropriative right a "vested right" based on prior decisions. Instead of balancing public and private interests to determine if the water rights were "vested," the court employed public policy to establish an existing wrong and to give the state the right to provide a remedy for the wrong. The court recognized the importance of the permittees' rights by requiring that the remedy be reasonable. Thus, the court shifted analysis from the nature of the right to the reasonableness of the remedy. In effect, the court held that the water right was not a vested right under these circumstances because of the public interest in putting water to beneficial use[75] and the mini-

[69] *See* note 27 *supra*, and accompanying text.

[70] TEX. REV. CIV. STAT. ANN. art. 7474 (1954).

[71] 60 Nev. 280, 108 P.2d 311 (1940). Since the Nevada Constitution does not expressly prohibit retroactive laws, the Texas court could have dismissed the *Manse Springs* decision on that basis. But the Texas court upheld the retroactive law despite the express provision in the Texas Constitution, whereas the Nevada court held the law unconstitutional under due process alone.

[72] Evidence of intent may be found in the conduct of the appropriator, and one kind of conduct which reveals an intent to abandon is nonuse for a substantial period of time.

[73] The general rule is that an appropriator will not be held to strict account for nonuse of water under circumstances in which a reasonable man could not be expected to use the water. J. SAX, WATER LAW, PLANNING & POLICY 285 (1968).

[74] *See* Gila Water Co. v. Green, 29 Ariz. 304, 241 P. 307 (1925); Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994 (1918); Smith v. Hawkins, 110 Cal. 122, 42 P. 453 (1895); *In re* Escalante Valley Drainage Area, 12 Utah 2d 112, 363 P.2d 777 (1961). However, these decisions do not discuss the problem of retroactive laws.

[75] In 1948 approximately 30% of the outstanding inactive permits on three major rivers