



***Texas Water
Resources
Institute***

**May 1977
Volume 3
No. 4**

Water in Court

By Lou Ellen Ruesink, Editor, Texas Water Resources

Adjudication of water rights--although not a common household term--is becoming a familiar one in thousands of Texas communities. It refers to the judicial process which will evaluate, record, and administer all claims of water rights for the first time in Texas history.

For the past 20 years irrigators, cities, and industries have participated in court adjudication cases to protect or to evaluate their rights to use water. Adjudication hearings have been announced in daily and weekly papers and discussions on water rights adjudication have received extensive radio and TV coverage. Politicians from city halls to the Capitol have regularly debated water rights issues.

Texas history books and court records verify that the right to water has been a continuous--often bitter-- battle throughout the state's development.

Ask any Western movie fan. During the taming of the West, more fights were over water than over women or land. Fencing off a water hole was always followed by a loud, bloody gun battle. Rivers were guarded by the sharpest gunfighters, and the last of the canteen water belonged to the man with the toughest fists.

Water wars rage on today in many areas of the state. While the arid western lands have always suffered water shortages, other parts of the state are now realizing that their water resources are limited. Long years of bitterness and distrust over the use of water in East Texas are surfacing and will take many more long years before decisions can be made.

Judicial decisions instead of gunfighting--that's what adjudication is all about. Lawyers are now battling the water wars in courts instead of canyons.

Texas law is quite clear as to the ownership of surface water:

- Precipitation is the property of the land on which it falls until it reaches a defined water course, river, stream, lake or bay.
- All water in water courses, rivers, streams, lakes, and bays is the property of the state.

Quite clear? Then why have Texans fought over water since Spanish rule days? Why did one court case take more than 20 years to settle who could use the water from the Lower Rio Grande River? Why is one agency in Austin spending 20 years, millions of dollars, and thousands of court hours to determine water claims?

The right to use that state-owned water is the issue before the courts.

Riparian Rights

Texas has accepted two types of rights to use state water--riparian and appropriative. Basically the courts created the riparian rights while the legislature created the appropriative rights.

Generally speaking, lands which were patented from the state between 1840 and 1895, and which border or have frontage upon a stream are riparian, and the owners of the land have a right to share in the use of the normal flow of the stream as it passes their land.

Texas courts adopted the common law of England and with it acquired the riparian doctrine. Subsequent modifications of the original doctrine by the courts gave riparians the right to make reasonable use of water for irrigation or for other extensive and consumptive purposes. Land acquired from the state after 1895 no longer carried riparian rights.

Several unsuccessful legislative attempts have been made to more accurately define riparian rights. In 1955 the legislature adopted a statute requiring all water users, including riparians, to file a statement each March with the Texas Water Rights Commission (TWRC), stating the amount of water used during the preceding calendar year. Most riparians failed to file reports, and inadequate penalty provisions kept the law from being enforced.

As late as 1968 the Commission had no record of the number of riparian water users in any major river basin, the extent of their claims, or the amount of water they were using.

The concept of appropriation as a right to use water came out of the Western U.S. where public land was parceled out to individuals but gave them no control over streams. This left water to be treated as though it belonged to no one, and could be appropriated in a manner similar to that of a gold claim. In the absence of public control, men took water from streams and used it; that is, they "appropriated" it.

When water laws were enacted, this appropriation practice was legalized and the basis of such laws became known as the Doctrine of Prior Appropriation. The doctrine was

simply that the first user on a stream has a better right to the supply in times of shortage. Population growth and increased demand for water have produced many limitations and modifications to the doctrine.

Originally appropriation was accomplished through a very informal procedure; the landowner simply filed a sworn statement and map with his county clerk describing what he intended to do. Claims often overlapped, described huge acreages to be irrigated, or claimed more water than the dependable flow of the stream could produce.

Since a legislative act in 1913, anyone wishing to use water from rivers and streams for any purpose other than domestic and livestock, must make a written application to the Texas Water Rights Commission to obtain a permit.

The TWRC administers the rights to use the state's waters. The Commission consists of three members appointed by the Governor with the consent of the Senate for six-year terms. The Commission administers over 10 thousand claims to some 33.7 million acre-feet of water. Most permits use water for irrigation, though many of the largest are for municipal and industrial use.

Correlating Water Rights

Both riparian and appropriative rights exist on many streams creating problems for Texas courts and water agencies in trying to correlate these conflicting types of rights.

Several attempts have been made in this century to more accurately define or quantify the riparian rights so that all existing claims to or use of surface water could be inventoried for more effective water resource management.

A legislative act as early as 1917 gave a state agency the authority to adjudicate water rights on streams, but this authorization was held unconstitutional by the Texas Supreme Court in 1921. A court decision in 1926 dividing streamflow into ordinary normal flow and flood flow limited riparians to the ordinary or normal flow. State courts and water agencies have found this division difficult, if not impossible, to apply in practice. However, until the adjudication of all water rights in Texas is completed this definition will remain the basis for correlating riparian and appropriative rights.

The Water Rights Adjudication Act was passed in 1967 to account for all surface water claims and to adjudicate or legally evaluate all surface water rights. The act authorizes the Texas Water Rights Commission to determine the nature and extent of each water claim for every stream in Texas, then to file the determination with the courts.

Adjudication actually began a decade before the legislative act. A massive law suit involving the Rio Grande below Falcon Reservoir resulted in the court determination of surface water rights. The Adjudication Act established a procedure whereby a state agency could investigate and make determinations on claims in order to isolate the problems to be brought to the attention of the courts. This procedure is designed to free

the courts from the initial investigating and determination steps and yet assure each claimant his day (or week, or month) in court.

Under the act, all unrecorded claims of water rights were required to be filed with the Texas Water Rights Commission to be kept in effect. By 1974, some 11,600 previously unrecorded claims, mostly riparian, were filed, claiming over 7 million acre-feet of water. Any claims not filed by 1974 are considered "extinguished"--permanently invalid--by the TWRC.

Rather than adjudicate surface water rights for whole river basins, the Commission has chosen to proceed on an area basis, determining water rights in areas which have long histories of recurring water disputes.

Legal Process

After investigating each claim and actually surveying the entire area, the TWRC publishes a report. Notice of the adjudication is then sent to every claimant in the area with instructions to file a claim on their right and to appear at an evidentiary hearing.

At the hearing, the claimant can present his own claim or have a lawyer present his case. Hearings are held throughout the area and may take several weeks or months to complete. The hearing examiner listens to all evidence under oath and then recommends a preliminary determination to the Commission.

After all parties have had a chance to review the preliminary determination, objections are considered and a final determination issued. This is the final administrative decision, subject to questions for rehearing. The determination is then filed with a district court. It automatically is reviewed in district court and can be appealed through the court process and ultimately to the state supreme court. Certificates of adjudication are issued only after a final judgment has been made--at least 3 years from the first investigations.

As adjudication is completed in an area, the Commission will employ a watermaster--water policeman--to oversee the water rights. The adjudication act provides for an assessment of water rights holders to pay for the cost of the watermaster system in their respective areas.

The Lower Rio Grande area, where adjudication was completed in 1971, has the only watermaster system in operation in the state. The watermaster, and staff of 8, is responsible for the day-to-day management of the river and the supervision of the use of state water by water rights holders.

Until the state has an accurate account of all water rights and has them under one system, it is impossible to effectively manage and develop this important natural resource.

All claims filed with the TWRC will be reviewed during the adjudication procedure. Once adjudication is complete, certificates of adjudicated water rights will be issued to

successful claimants. This will result in all rights for the first time being limited to a specific maximum quantity of water and will cancel unused permits.

A major benefit expected to result from the adjudication proceedings is that additional unclaimed surface water may be discovered. Good news in an age when Texans are acutely aware of diminishing groundwater supplies and skyrocketing water development costs.

Water Rights Review

Lloyd Kepha owns and irrigates 156 acres on the west bank of the Colorado River in Bastrop County. He pumps water directly from the river in dry summer months to water his pasture land.

As the owner of riparian land--land adjacent to a river--Kepha has had the legal right to pump water from the river for irrigation. Original owners of this particular land were granted that right by the state before 1895.

Unless Kepha complies with all of the requirements of the Adjudication Act of 1967, he may lose forever his right to use the river water for any purpose other than domestic use.

In 1969 Kepha filed a claim with the Texas Water Rights Commission stating that his 156 acres of bottom land has been irrigated from the river since before 1900. He also claimed that the largest amount of water drawn from the river was in the summer of 1963. Although Kepha does not know the exact amount of water that was used, "the pumps ran steady for 30 days and 30 nights except to oil the motor." Historically, riparian rights have been to irrigate a specific number of acres; however, the future water rights of riparian land will be for a specific amount of water and will depend upon how much water was actually used in any one year between 1963-67.

Filing this claim did not assure Kepha the continued right to use the water for irrigation, but it was the first step to assure that right. This spring he and all others in the county who claim a right to use water from the Colorado and its tributaries have appeared at adjudication hearings held in Bastrop by the Texas Water Rights Commission.

The Commission hearing examiner, Paul Elliott, has heard 3 weeks of testimony from riparian land owners, large power plant operators, recreation developers, and Texas Parks and Wildlife representatives. Each asked to be allowed to continue using water from the river in amounts ranging from 2 acre-feet to 10,000 acre-feet per year. Both riparian and appropriative rights are being evaluated according to the amount of water used in 1963-67.

Elliott will consider all sworn testimony from individuals, attorneys, and engineers, and will recommend to the Commission what rights should be granted. The Commission determination will not be made until all hearings are completed in the lower Colorado River basin--probably not before 1978.

After that more hearings will be held for claimants to appeal; then the determination and all evidence presented will be reviewed by a district court.

If Kepha's rights are upheld he will receive a certificate of adjudication which will entitle him and future owners of the 156 acres of land to a specific amount of water from the river each year.

By 1979--more than ten years from the time he filed his claim and 25 years after he began irrigating-- Lloyd Kepha will know for certain his legal right to take water from the Colorado.